CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 227

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

JOSEPH SUNNEN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 28, 1947
CERTIORARI GRANTED OCTOBER 13, 1947

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 13,425

TAX REVIEW.

JOSEPH SUNNEN, PETITIONER,
vs.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

No. 13,426

TAX REIVEW.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,
vs.
JOSEPH SUNNEN, RESPONDENT.

ON PETITIONS TO REVIEW DECISION OF THE TAX COURT OF THE UNITED STATES.

FILED AUGUST 29, 1946.

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[fol. 1] Docket Entries.

Joseph Sumnen, Petitioner,
Docket No. 6089. vs.
Commissioner Of Internal Revenue, Respondent.

Appearances:

For Taxpayer: C. Powell Fordyce.

For Comm'r.: T. W. Elliott, R. C. Hormberg.

Transferred to Judge Leech 1/28/46.

1944

Sept. 21—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 22—Copy of petition served on General Counsel.

Nov. 14—Answer filed by General Counsel.

Nov. 14—Request for hearing in St. Louis, Mo. filed by General Counsel.

Nov. 22—Notice issued placing proceedings on St. Louis, Mo. calendar.
Service of answer and request made.

Dec. 29—Reply to answer filed by taxpayer. Copy served.

1945

Feb. 3—Hearing set March 19, 1945, St. Louis, Mo.

Mar. 19—Hearing had before Judge Van Fossan on merits. Stipulation of facts filed (Taken under submission.) Briefs due May 3, 1945. Reply briefs due May 18, 1945.

Mar. 29—Transcript of hearing 3/19/45 filed.

Apr. 30—Brief filed by taxpayer.

May 3—Motion for extension to June 2, 1945 to file brief filed by General Counsel. 5/4/45 Granted.

May 10—Motion for extension to July 2, 1945 to file reply brief filed by taxpayer. 5/10/45 Granted.

May 24—Brief filed by General Counsel. Copy served 5/25/45.

May 25—Copy of brief served on General Counsel.

Jun. 25—Reply brief filed by taxpayer. Copy served.

1946

Mar. 11—Findings of fact and opinion rendered, Judge Leech. Decision will be entered under Rule 50. Copy served 3/11/46.

Mar. 3—Agreed, computation of deficiency filed by General Counsel.

May 8—Decision entered, Judge Black, Div. 15.

Jul. 30—Petition for review by U. S. Circuit Court of Appeals for the Eighth Circuit, and Statement of Points filed by taxpayer.

Jul. 30—Notice of filing petition for review sent to J. P. Wenchel, with statement of points and proof of service filed.

Aug. 6—Petition for review by U. S. Circuit Court of Appeals for the Eighth Circuit filed by General Counsel.

Aug. 6—Notice of filing petition for review sent to C. Powell Fordyce filed.

Aug. 6—Joint praecipe for transcript on review filed with proof of service thereon.

Aug. 12—Proof of service of General Counsel's petition for review filed.

Aug. 16—Proof of service of petition for review on Mr. Sunnen filed.

[fol. 2] (Petition of Joseph Sunnen.)

(Received and Filed September 21, 1944, The Tax Court of the United States.)

The Tax Court Of The United States

Joseph Sunnen, Petitioner,
Docket No. 6089. vs.
Commissioner Of Internal Revenue, Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols: IRA: 90D: SL. File No. 014127), dated June 28, 1944, and as a basis of his proceeding alleges as follows:

A. The petitioner is an individual residing at 400 South Warson Road, Clayton, Missouri. The income tax returns of the petitioner for the calendar years here involved were duly filed by him with the Collector of Internal Revenue for the First District of Missouri at St. Louis, Missouri.

B. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on or about, but not before, June 28, 1944.

[fol. 3] C. The taxes in controversy are deficiency income taxes, alleged by respondent to be owed by petitioner for the calendar years, and in the amounts set forth below, to-wit:

Calendar Year	Deficiency Assessment
1937	$ 5,067.11
1938	4,533.01
1939	7,994.77
1940	29,540.50
1941	103,227.18
Total	$ 150,362.57

D. The determination of said deficiency taxes set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erred in determining that petitioner is taxable for the calendar year of 1937 upon royalties of $20,400.03 which Sunnen Products Company, a Mis-

souri corporation, having its principal place of business in St. Louis County, Missouri, (hereinafter for convenience referred to as "said company") paid in said year to Cornelia Sunnen, petitioner's wife; and respondent also erred in failing to determine that the assessment of any deficiency by him against petitioner for said year was, prior to such assessment, barred by the statute of limitations set forth in Sec. 275(a) Revenue Act of 1936.

(2) The respondent erred in determining that petitioner is taxable for the calendar year of 1938 upon royalties of $17,318.80 which said company in said year paid to petitioner's said wife; and respondent also erred in failing to [fol. 4] determine that the assessment of any deficiency by him against the petitioner for said year was, prior to such assessment, barred by the statute of limitations set forth in Sec. 275(a) of the Revenue Act of 1938.

(3) The respondent erred in determining that petitioner is taxable for the calendar year of 1939 upon royalties of $25,243.77, which said company in said year paid to petitioner's said wife.

(4) The respondent erred in determining that petitioner is taxable for the calendar year of 1940 upon royalties of $50,492.50, which said company in said year paid to petitioner's said wife.

(5) The respondent erred in determining that petitioner is taxable for the calendar year of 1941 upon royalties of $149,002.78 which said company paid in said year to petitioner's said wife.

(6) The respondent erred in failing to find that the decision of the Board of Tax Appeals in the proceeding entitled "Joseph Sunnen vs. Commissioner of Internal Revenue", Docket Nos. 64,117, 69,526, and 74,077, bars him from now determining that petitioner owes income taxes for any of the above-mentioned years on any of the aforesaid royalties so paid by said company to his said wife.

[fol. 5] E. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) As to the alleged 1937 deficiency, the petitioner states as follows:

Par. A. Prior to November 17, 1927 petitioner had invented a device known as a "Cylinder-Grinder" or as a "Honing Device for Cylinders", said device being hereinafter for convenience referred to as a Cylinder-Grinder. On said date petitioner filed an application for a patent on said invention, said application being numbered 233,788. Said application was allowed on December 4, 1934, and U. S. Patent No. 1, 982,836 was issued to petitioner. On January 10, 1928 petitioner and said company (Sunnen Products Company) entered into a contract whereby petitioner licensed said company, for a period of ten years from said date, to manufacture and sell said device for a royalty of ten percent of the gross sales price thereof. On January 8, 1929 petitioner executed the following assignment on the back of said contract:

"For value received, I hereby sell, assign, and transfer to Mrs. Cornelia Sunnen all of my rights, title and interest in and to the royalties which shall accrue hereafter to me on the within contract."

On the back of said contract there also appears the following notation; "Royalty lease. Standard Cylinder—Grinder assigned to Cornelia Sunnen January 8, 1929." Under date [fol. 6] of January 15, 1929 the petitioner addressed and signed a letter to the company stating as follows:

"Confirming verbal notice given you at the annual stockholder's meeting held at the company's office on January 8, 1929, I have for value received assigned to Cornelia Sunnen, all of my rights, title and interest in the royalty contract covering 'Cylinder-Grinders', covered by Letters Patent No. 233,788, said contract dated the 10th day of January, 1928."

Further confirming the aforesaid assignment the petitioner on or about December 21, 1931 delivered to said company a written instrument executed by him which stated that the Commissioner of Internal Revenue had raised some question as to the sufficiency of the foregoing assignment; that the petitioner in all respects confirmed said foregoing assignment; that the petitioner assigned, set over, and delivered to Cornelia Sunnen all of the petitioner's right, title, and interest in and to said royalty contract of January 10, 1928; and that the royalties accruing under said

contract are the exclusive property of Cornelia Sunnen, should be paid to her, and that she should have the sole right to collect and retain the same. In the aforesaid proceeding entitled Joseph Sunnen vs. Commissioner of Internal Revenue, Docket Nos. 64,117, 69,526, and 74,077, the United States Board of Tax Appeals on June 29, 1935 entered its decision holding that the petitioner was not taxable for 1929, 1930, and 1931 upon the royalties paid to his wife by said company in said years, under and pursuant to the above-mentioned royalty contract and assignments. The royalties paid by said company to petitioner's wife in [fol. 7] 1937, which amounted to $4,881.35, were likewise paid to her under and pursuant to the same contract and assignments involved in the above-mentioned proceedings before the United States Board of Tax Appeals. However, the respondent has, in this proceeding, ignored said prior decision of the United States Board of Tax Appeals, and has determined that these royalties are taxable to the petitioner as a part of his income for 1937.

Par. B. Prior to December 4, 1931 the petitioner had invented a device known as a "Bushing-Grinder" or as a "Pinhole Grinder", said device being hereinafter for convenience referred to as a Bushing Grinder. On said date petitioner filed an application for a patent on said invention, said application being numbered 578,923. Said application was allowed on June 13, 1933, and United States Patent No. 1,913,689 was issued to petitioner. On December 5, 1931 petitioner and said company entered into a contract which was substantially similar in all material respects to the royalty agreement mentioned in paragraph 1A above, and which provided that the petitioner licensed said company, for a period of ten years from said date, to manufacture and sell said device for a royalty of ten percent. of the gross sales price thereof. Also on December 5, 1931 the petitioner executed and delivered to said company a written instrument which provided that he assigned to his said [fol. 8] wife all of his right, title, and interest in and to the aforesaid Bushing Grinder royalty contract, together with the sole right to collect and receive any royalties due under said royalty contract, the same to be collected and received by her as her sole and exclusive property. The royalties paid by said company to petitioner's wife in 1937,

under the aforesaid Bushing Grinder royalty contract and assignment, amounted to $15,518.68. Respondent has determined that these royalties are taxable to petitioner as a part of his income for 1937.

Par. C. The petitioner alleges that none of said royalties were taxable to him as a part of his income for 1937, and that the statute of limitations set forth in Sec. 275(a) of the Revenue Act of 1936 had expired prior to the assessment on June 28, 1944 by the respondent of said deficiency of $5,067.11 for said year against the peitioner.

(2) As to the alleged 1938 deficiency, petitioner states as follows:

Par. A. On January 10, 1938, the date of the expiration of said Cylinder-Grinder royalty contract mentioned in paragraph 1A above, the petitioner and said company executed an agreement renewing said contract upon exactly the same terms and conditions as contained in said original contract, except that the period covered by such renewal contract extended from January 10, 1938 to December 4, 1951 (the date of the expiration of the patent involved). [fol. 9] Also on January 10, 1938 the petitioner executed and delivered to said company a written instrument which provided that he assigned all of his right, title, and interest in and to said renewal agreement to his wife, together with the sole right to collect and receive any royalties theretofore or thereafter accruing thereunder, said royalties to be the sole and exclusive property of Cornelia Sunnen. Under and pursuant to said renewal agreement and assignment, the company paid royalties to the petitioner's wife for 1938 amounting to $3,529.21.

Par. B. Under and pursuant to the Bushing-Grinder royalty agreement and assignment mentioned in paragraph 1B above, said company in 1938 paid to petitioner's said wife royalties amounting to $13,789.59.

Par. C. Respondent has determined that all of said Cylinder-Grinder and Bushing-Grinder royalties are taxable to the petitioner as a part of his income for 1938.

Par. D. Petitioner alleges that none of said royalties are taxable to him as a part of his income for 1938, and that the statute of limitations set forth in Sec. 275(a) of the

Revenue Act of 1938 had expired prior to the assessment on June 28, 1944 by the respondent of said deficiency of $4,533.01 for said year against the petitioner.

[fol. 10] (3) As to the alleged 1939 deficiency, petitioner states as follows:

Par. A. Pursuant to the renewal Cylinder-Grinder royalty agreement and assignment mentioned in paragraph 2A above, said company in 1939 paid to petitioner's said wife royalties amounting to $3,713.83.

Par. B. Pursuant to the Bushing-Grinder royalty agreement and assignment mentioned in paragraph 1B above, said company in 1939 paid to petitioner's said wife royalties amounting to $15,780.50.

Par. C. Prior to May 22, 1939 petitioner had invented a device known as a "Crankshaft Grinder". On said date petitioner filed an application for a patent on said device, said application being numbered 275092. Said application was allowed on May 6, 1941, and U. S. Patent No. 2,240,527. was issued to petitioner. In addition, on May 22, 1939 petitioner had invented another device also known as a Crankshaft Grinder, and was in the course of preparing an application for a patent thereon (said application being filed on December 29, 1939, being numbered 311669, and being allowed on January 26, 1943 when Patent No. 2,309,615 was issued to petitioner's said wife as assignee of petitioner). On June 20, 1939 petitioner and said company entered into a contract which was substantially similar to the other royalty contracts mentioned above, and which provided that petitioner licensed said company, for [fol. 11] a period of ten years from said date, to manufacture and sell both of said devices for a royalty of ten percent. of the gross sales price thereof. Moreover, on June 20, 1939 petitioner executed and delivered to said company a written instrument providing that he assigned to his said wife all of his right, title, and interest in and to the aforesaid royalty contract, covering both of said Crankshaft Grinders, together with the sole right to collect and receive all royalties due under said royalty contract, the same to be collected and received by her as her sole and exclusive property. The royalties paid by said company to petitioner's wife in 1939, under the aforesaid royalty contract and assignment amounted to $5,749.44.

Par. D. Respondent has determined that all of said royalties are taxable to the petitioner as a part of his income for 1939.

Par. E. Petitioner alleges that none of said royalties are taxable to him as a part of his income for 1939.

(4) As to the alleged 1940 deficiency petitioner states as follows:

Par. A. Pursuant to the renewal Cylinder-Grinder royalty agreement and assignment metioned in paragraph 2A above, said company in 1940 paid to petitioner's said wife royalties amounting to $4,951.73.

[fol. 12] Par. B. Pursuant to the Bushing-Grinder royalty agreement and assignment mentioned in paragraph 1B above, said company in 1940 paid to petitioner's said wife royalties amounting to $23,259.10.

Par. C. Pursuant to the Crankshaft Grinder royalty agreement and assignment mentioned in paragraph 3C above, said company in 1940 paid to petitioner's wife royalties amounting to $22,281.67.

Par. D. Respondent has determined that all of said royalties are taxable to petitioner as a part of his income for 1940.

Par. E. Petitioner alleges that none of said royalties are taxable to him as a part of his income for 1940.

(5) As to the alleged 1941 deficiency, petitioner states as follows:

Par. A. Pursuant to the renewal Cylinder-Grinder royalty agreement and assignment mentioned in paragraph 2A above, said company in 1941 paid to petitioner's said wife royalties amounting to $6,821.97.

Par. B. Pursuant to the Bushing-Grinder royalty agreement and assignment mentioned in paragraph 1B above, said company in 1941 paid to petitioner's said wife royalties amounting to $123,565.38.

[fol. 13] Par. C. Pursuant to the Crankshaft Grinder royalty agreement and assignment mentioned in paragraph 3C above, said company in 1941 paid to petitioner's said wife royalties amounting to $18,615.43.

Par. D. Respondent has determined that all of said royalties are taxable to petitioner as part of his income for 1941.

Par. E. Petitioner alleges that none of said royalties are taxable to him as a part of his income for 1941.

Wherefore, the petitioner prays that this Court may hear this proceeding and determine that there are no deficiency income taxes due from the petitioner for the calendar years of 1937, 1938, 1939, 1940, and 1941.

C. POWELL FORDYCE,
Counsel for Petitioner.
506 Olive Street,
St. Louis 1, Missouri.

State Of Missouri,
County Of St. Louis—ss.:

JOSEPH SUNNEN, being duly sworn, says that he is the petitioner above named; that he has read the foregoing [fol. 14] petition, and is familiar with the statements contained therein, and that the statements contained therein are true.

JOSEPH SUNNEN,

Subscribed and sworn to before me this 16th day of September, 1944.

(Seal)

LAURA M. ROBBINS,
Notary Public, St. Louis
County, Missouri.

My commission expires June 26, 1946.

[fol. 15] Exhibit "A"

Treasury Department
Internal Revenue Service

St. Louis, Missouri
June 28, 1944

Office of
Internal Revenue Agent in Charge
St. Louis Division
1767 Railway Exchange Building,

File #014127

IRA:90D:SL

Mr. Joseph Sunnen
400 So. Warson Road,
Clayton, Missouri

Dear Mr. Sunnen:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1937 to December 31, 1941, inclusive, discloses a deficiency of $150,362.57 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, St. Louis, Missouri, for the attention of EPS:AK. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest

period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

JOSEPH D. NUNAN, JR.,
Commissioner,
By N. B. Eshleman
Internal Revenue Agent in Charge.

Enclosures:
Statement
Form of waiver

[fol. 16] Statement.

IRA:90D:SL

Joseph Sunnen
400 So. Warson Road,
Clayton, Missouri

Tax Liability for the Taxable Years Ended December 31, 1937, December 31, 1938, December 31, 1939, December 31, 1940, and December 31, 1941.

	Income Tax		
	Liability	Assessed	Deficiency
1937	$ 7,793.58	2,726.47	5,067.11
1938	8,286.53	3,753.52	4,533.01
1939	13,258.94	5,264.17	7,994.77
1940	43,145.34	13,604.84	29,540.50
1941	130,576.30	27,349.12	103,227.18
Totals	$203,060.69	52,698.12	150,362.57

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated September 14, 1938, February 17, 1940, April 17, 1941, September 8, 1942, October 8, 1942 and February 26, 1943; to your protests dated November 30, 1942, December 11, 1942, and April 1, 1943; and to the statements made at the conferences held on January 15, 1943, April 8, 1943, and May 23, 1944.

A copy of this letter and statement has been mailed to your representative, Mr. C. Powell Fordyce, 506 Olive Street, St. Louis, Missouri in accordance with the authority contained in the power of attorney executed by you.

[fol. 17] Adjustments to Net Income

1937

Net income as disclosed by return		$ 30,616.03
Unallowable deductions and additional income:		
(a) Royalties	$20,400.03	
(b) Interest paid	1,716.64	
(c) Taxes	2,459.32	
(d) Expense to obtain mortgage	35.53	24,611.54
Total		$ 55,227.57
Nontaxable income and additional deductions:		
(e) Rental income	$ 7,008.71	
(f) Social security tax	87.98	7,096.69
Net income adjusted		$48,130.88

Explanation of Adjustments
1937

(a) Distributions made by Sunnen Products Co. to your wife, Cornelia Sunnen, in the form of royalties under license agreements with you, have been included in your gross income for the year 1937 in the amount of $20,400.03, in accordance with the provisions of section 22(a) of the Revenue Act of 1936.

(b), (c), (d), (e) and (f): These adjustments have been previously agreed to by you and the resulting overassessment has been scheduled.

Computation of Tax

1937

Net income adjusted		$ 48,130.88
Less:		
Personal exemption	$ 2,500.00	
Credit for dependents	1,600.00	4,100.00
Balance (surtax net income)		$ 44,030.88
Less:		
Earned income credit		1,400.00
Net income subject to normal tax		$ 42,630.88
[fol. 18] Normal tax at 4% on $42,630.88		$ 1,705.24
Surtax on $44,030.88		6,088.34
Correct income tax liability		$ 7,793.58
Income tax assessed:		
Original, Account No. 202294	$ 3,342.68	
Additional, Account No. 510142, Nov. 10, 1938 list	761.15	
Total assessed	$ 4,103.83	

Less:		
Previous allowance June 11, 1941	1,377.36	
Net assessment		2,726.47
Deficiency of income tax		$ 5,067.11

Adjustments to Net Income
1938

Net income as disclosed by return		$ 36,787.82
Unallowable deductions and additional income:		
(a) Royalties	$ 17,318.80	
(b) Interest paid	2,515.82	
(c) Taxes	316.99	20,151.61
Total		$56,939.43
Nontaxable income and additional deductions:		
(d) Rental income		7,218.35
Net income adjusted		$ 49,721.08

[fol. 19] Explanation of Adjustments
1938

(a) Distributions made by Sunnen Products Co. to your wife, Cornelia Sunnen, in the form of royalties under license agreements with you, have been included in your gross income for the year 1938 in the amount of $17,318.80, in accordance with the provisions of Section 22(a) of the Revenue Act of 1938.

(b), (c), and (d): These adjustments have been previously agreed to by you and the resulting overassessments resulting therefrom have been scheduled.

Computation of Tax
1938

Net income adjusted		$ 49,721.08
Less:		
Personal exemption	$ 2,500.00	
Credit for dependents	1,600.00	4,100.00
Balance (surtax net income)		$ 45,621.08
Less:		
Earned income credit		1,400.00
Net income subject to normal tax		$ 44,221.08
Normal tax at 4% on $44,221.08		$ 1,768.84
Surtax on $45,621.08		6,517.69
Correct income tax liability		$ 8,286.53
Income tax assessed:		
Original, Account No. 201370	$ 4,765.31	
Total assessed	$ 4,765.31	

Less:		
Previous allowance 4-17-40	$ 14.36	
Previous allowance 6-11-41	997.43	1,011.79
Net assessment		3,753.52
Deficiency of income tax		$ 4,533.01

[fol. 20] Adjustments to Net Income

1939

Net income as disclosed by return		$ 42,229.35
Unallowable deductions and additional income:		
(a) Royalties	$ 25,243.77	
(b) Interest paid	2,995.01	
(c) Taxes	500.11	28,738.89
Total		$70,968.24
Nontaxable income and additional deduction:		
(d) Rental income		6,983.78
Net income adjusted		$ 63,984.46

Explanation of Adjustments
1939

(a) Distributions made by Sunnen Products Co. to your wife, Cornelia Sunnen, in the form of royalties under license agreements with you, have been included in your gross income for the year 1939 in the amount of $25,243.77, in accordance with the provisions of Section 22(a) of the Internal Revenue Code.

(b), (c) and (d): These adjustments have been previously agreed to by you and the resulting overassessment has been scheduled.

Computation of Tax

1939

Net Income adjusted		$ 63,984.46
Less:		
Personal exemption	$ 2,500.00	
Credit for dependents	1,600.00	4,100.00
Balance (surtax net income)		$ 59,884.46
Less:		
Earned income credit		1,400.00
Net income subject to normal tax		$ 58,484.46
Normal tax at 4% on $58,484.46		$ 2,339.38
Surtax on $59,884.46		10,919.56
Correct income tax liability	Forward	$ 13,258.94

[fol. 21] Correct income tax liability	Brought forward	$ 13,258.94
Income tax assessed:		
Original, Account No. 201395	$ 6,140.21	
Less:		
Previous allowance 6-11-41	876.04	
Net assessment		5,264.17
Deficiency of income tax		$ 7,994.77

Adjustments to Net Income
1940

Net income as disclosed by amended return filed May 25, 1942	$ 48,846.92
Unallowable deduction and additional income:	
(a) Royalties	50,492.50
Net income adjusted	$ 99,339.42

Explanation of Adjustments
1940

(a) Distributions made by Sunnen Products Co. to your wife, Cornelia Sunnen, in the form of royalties under license agreements with you, have been included in your gross income for the year 1940 in the amount of $50,492.50, in accordance with the provisions of Section 22(a) of the Internal Revenue Code.

[fol. 22] Computation of Tax
1940

Net income adjusted	$ 99,339.42
Less:	
Credit for dependents	1,600.00
Balance (surtax net income)	$ 97,739.42
Less:	
Earned income credit	1,400.00
Net income subject to normal tax	$ 96,339.42
Normal tax at 4% on $96,339.42	$ 3,853.58
Surtax on $97,739.42	35,514.08
Total tax	$ 39,367.66
Defense tax (10% of $39,367.66)	3,936.77
Total income and defense taxes	$ 43,304.43

Less:		
Income tax paid to a foreign country or U. S. Possession		159.09
Correct income and defense tax liability		$ 43,145.34
Income and defense taxes assessed:		
Original, Account No. 203792	$ 12,240.99	
Additional, Account No. 300113, May, 1942 list	1,363.85	13,604.84
Deficiency of income and defense taxes		$ 29,540.50

[fol. 23]

Adjustments to Net Income
1941

Net income as disclosed by return		$ 60,570.28
Unallowable deductions and additional income:		
(a) Royalties	$149,002.72	
(b) Long term loss	175.00	
(c) Other income	638.75	
(d) Other deductions	665.44	150,481.97
Net income adjusted		$211,052.25

Explanation of Adjustments
1941

(a) Distributions made by Sunnen Products Co. to your wife, Cornelia Sunnen, in the form of royalties under license agreements with you, have been included in your gross income for the year 1941 in the amount of $149,002.78, in accordance with the provisions of Section 22(a) of the Internal Revenue Code.

(b) On your return you deducted from gross income $1,738.90 for net long term loss from sale of capital assets, whereas the information on file discloses the correct amount to be $1,563.90. Income is, therefore, increased by $175.00.

(c) The Sunnen Products Co. paid $1,277.50 for cost of audit to determine property rights between yourself and your wife of rental property, and one-half thereof or $638.75 was paid for you and constitutes taxable income to you.

(d) On line 16 of your return you deducted $665.44 as other deductions for a portion of the cost of an audit to determine property rights which is not an allowable deduction. Income is, therefore, increased by $665.44.

[fol. 24] Computation of Tax

1941

Net income adjusted	$ 211,052.25
Plus:	
Net long term loss	1,563.90
Total	$ 212,616.15
Less:	
Credit for dependents	1,600.00
Balance (surtax net income)	$ 211,016.15
Less:	
Earned income credit	1,400.00
Net income subject to normal tax	$ 209,616.15
Normal tax at 4% on $209,616.15	$ 8,384.65
Surtax on $211,016.15	122,660.82
Total tax	$ 131,045.47
Minus:	
30% of long-term loss of $1,563.90	469.17
Correct income tax liability	$ 130,576.30
Income tax assessed:	
Original, Account No. 325765	27,349.12
Deficiency of income tax	$ 103,227.18

WNG:AK

[fol. 25] (Answer of Commisioner of Internal Revenue.)

(Received and Filed November 14, 1944, The Tax Court of the United States.)

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits, denies, and alleges as follows:

A. Admits that petitioner is an individual residing at 400 South Warson Road, Clayton, Missouri, and that the income tax returns of the petitioner for the calendar years here involved were filed by him with the Collector of Internal Revenue for the First District of Missouri at St. Louis, Missouri, but denies the remaining allegation of paragraph A of the petition.

B, C. Admits the allegations contained in paragraphs B and C of the petition.

D. (1) Denies that the Commissioner erred as alleged in subparapgraph (1) of paragraph D of the petition.

(2) Denies that the Commissioner erred as alleged in subparagraph D of the petition.

[fol. 26] (3) Denies that the Commissioner erred as alleged in subparagraph (3) of paragraph D of the petition.

(4) Denies that the Commissioner erred as alleged in subparagraph (4) of paragraph D of the petition.

(5) Denies that the Commissioner erred as alleged in subparagraph (5) of paragraph D of the petition.

(6) Denies that the Commissioner erred as alleged in subparagraph (6) of paragraph D of the petition.

E. (1) Par. A. Admits that petitioner invented a device known as a "cylinder grinder," that he secured a patent covering said device, that on January 10, 1928, petitioner and Sunnen Products Company entered into a contract whereby petitioner licensed said company for a period of ten years from said date to manufacture and sell said device for a royalty of 10 percent of the gross sales price thereof; that under date of June 29, 1935, the Board of Tax Appeals promulgated an opinion in the case of Joseph Sunnen, Docket Nos. 64117, 69526, and 74077, holding that the petitioner therein was not taxable on certain royalties; and that respondent has determined that petitioner is taxable on certain royalties for the year 1937; but denies the remaining allegations contained in subparagraph (1) A of paragraph E of the petition.

Par. B. Admits that on December 5, 1931, petitioner entered into a license agreement with Sunnen Products Company for the manufacture and sale of a device known as a "pin-hole grinder," with respect to which petitioner had made application for a patent; that under the terms [fol. 27] of such agreement petitioner licensed said company for a period of ten years from said date to manufacture and sell said device for a royalty of ten percent of the gross sales price thereof; and that respondent has determined that petitioner is taxable on certain royalties for the year 1937, but denies the remaining allegations contained in subparagraph (1) B of paragraph E of the petition.

Par. C. Admits that the statute of limitations set forth in section 275(a) of the Revenue Act of 1936 expired prior to June 28, 1944, but denies the remaining allegations set forth in subparagraph (1) C of paragraph E of the petition.

(2) Par. A. Admits that in 1938 petitioner and Sunnen Products Company entered into a royalty contract with respect to the "cylinder grinder", but denies the remaining allegations contained in subparagraph (2) A of paragraph E of the petition.

Par. B. Denies the allegations set forth in subparagraph (2) B of paragraph E of the petition.

Par. C. Admits the allegations contained in subparagraph (2) C of paragraph E of the petition.

Par. D. Admits that the statute of limitations set forth in section 275(a) of the Revenue Act of 1938 expired prior to June 28, 1944, but denies the remaining allegations contained in subparagraph (2) of paragraph E of the petition.

(3) Par. A. Denies the allegations set forth in subparagraph (3) A of paragraph E of the petition.

[fol. 28] Par. B. Denies the allegations contained in subparagraph (3) B of paragraph E of the petition.

Par. C. Admits that in 1939 petitioner entered into a license agreement with Sunnen Products Company for the manufacture and sale of a device known as a "crankshaft grinder", and that under the terms of such agreement he was to receive a royalty measured by ten percent of the gross sales price, but denies the remaining allegations of subparagraph (3) C of paragraph E of the petition.

Par. D. Admits the allegations set forth in subparagraph (3) D of paragraph E of the petition.

Par. E. Denies the allegations contained in subparagraph (3) E of paragraph E of the petition.

(4) Par. A. Denies the allegations contained in subparagraph (4) A of paragraph E of the petition.

Par. B. Denies the allegations contained in subparagraph (4) B of paragraph E of the petition.

Par. C. Denies the allegations contained in subparagraph (4) C of paragraph E of the petition.

Par. D. Admits the allegations contained in subparagraph (4) D of paragraph E of the petition.

Par. E. Denies the allegations contained in subparagraph (4) E of paragraph E of the petition.

(5) Par. A. Denies the allegations contained in subparagraph (5) A of paragraph E of the petition.

Par. B. Denies the allegations contained in subparagraph (5) B of paragraph E of the petition.

[fol. 29] Par. C. Denies the allegations contained in subparagraph (5) C of paragraph E of the petition.

Par. D. Admits the allegations contained in subparagraph (5) D of paragraph E of the petition.

Par. E. Denies the allegations contained in subparagraph (5) E of paragraph E of the petition.

F. Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

G. Further answering the petition, for an affirmative defense, respondent alleges that the five-year period of limitation is applicable under section 275(c) of the Revenue Acts of 1936 and 1938 for assessment and collection of the income tax deficiencies determined by the Commissioner in the amounts of $5,067.11 for 1937, and $4,533.01 for 1938, as set forth in his notice of deficiency, copy of which is attached to the petition as Exhibit "A". In support of the Commissioner's determination set forth in said notice of deficiency (which notice is hereby adopted and incorporated herein by reference), respondent, by such adoption and incorporation, affirmatively alleges and relies upon all the facts, statements, and findings therein, and in addition thereto alleges and relies upon the following facts:

(1) For the taxable year 1937 petitioner filed with the Collector of Internal Revenue for the First District of Mis-

souri an individual income tax return on March 16, 1938, wherein he reported gross income in the total amount of $38,992.40.

[fol. 30] (2) In truth and in fact, the gross income of petitioner for the taxable year 1937 totaled $59,392.43 ($38,992.40 plus $20,400.03).

(3) Petitioner improperly omitted from the gross income stated in his income tax return for 1937 an amount in excess of 25 percent of his total gross income for such year, and the income tax deficiency determined by the Commissioner for 1937 may have been assessed and collected within five years after the return was filed, under section 275(c) of the Revenue Act of 1936.

(4) In pursuance of the provisions of the existing internal revenue laws, petitioner duly executed on February 27, 1943, a "Consent Fixing Period of Limitation upon Assessment of Income and Profits Tax under Section 275(c) of the Revenue Act of 1936," covering the taxable year 1937, to June 30, 1944, and on May 9, 1944, petitioner duly executed a "Consent Fixing Period of Limitation upon Assessment of Income and Profits Tax under Section 275(c) of the Revenue Act of 1936," covering the taxable year 1937, to June 30, 1945.

(5) The period of limitation upon assessment and collection of an income tax deficiency for the year 1937 had not expired at the time the Commissioner of Internal Revenue mailed his notice of deficiency to petitioner on June 28, 1944, asserting an income tax deficiency for such year.

(6) For the taxable year 1938 petitioner filed with the Collector of Internal Revenue for the First District of Missouri an individual income tax return on March 15, 1939, [fol. 31] wherein he reported gross income in the total amount of $45,625.36.

(7) In truth and in fact, the gross income of petitioner for the taxable year 1938 totaled $62,944.16 ($45,625.36 plus $17,318.80).

(8) Petitioner improperly omitted from the gross income stated in his income tax return for 1938 an amount in excess of 25 percent of his total gross income for such year, and the income tax deficiency determined by the Commissioner for 1938 may be assessed and collected within five years after the return was filed, under section 275(c) of the Revenue Act of 1938.

(9) In pursuance of the provisions of the existing internal revenue laws, petitioner executed on January 6, 1944, a "Consent Fixing Period of Limitation upon Assessment of Income and Profits Tax under Section 275(c) of the Revenue Act of 1938," covering the taxable year 1938, to June 30, 1945.

(10) The period of limitation upon assessment and collection of an income tax deficiency for the year 1938 had not expired at the time the Commissioner of Internal Revenue mailed his notice of deficiency to petitioner on June 28, 1944, asserting an income tax deficiency for such year.

Wherefore, it is prayed:

(1) That the Tax Court enter its decision that the petitioner improperly omitted from the gross income stated in his income tax returns for 1937 and 1938 amounts in excess of 25 percent of his total gross income for such years; [fol. 32] that for 1937 and 1938 the five-year period of limitation for assessment and collection of income tax deficiencies attaches pursuant to section 275(c) of the Revenue Acts of 1936 and 1938; that the Commissioner's notice of deficiency dated June 28, 1944, was timely mailed to petitioner; and that the assessments of the said income tax deficiencies for the years 1937 and 1938 are not barred.

(2) That the Tax Court redetermine the correct amounts of deficiencies in this proceeding to be equal to the amounts determined by the Commissioner in his deficiency notice dated June 28, 1944, namely, $5,067.11 in income tax for 1937, $4,533.01 in income tax for 1938, $7,994.77 in income tax for 1939, $29,540.50 in income tax for 1940, and $103,227.18 in income tax for 1941.

(3) That the petitioner's appeal be denied and the respondent's determination be approved.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue

Of Counsel:
ORRIS BENNETT,
Division Counsel.

LOYAL E. KEIR,
Special Attorney,
Bureau of Internal Revenue.

LEK/mcs 11-9-44

[fol. 33] (Reply of Joseph Sunnen.)

(Received and Filed December 29, 1944, The Tax Court of the United States.)

Comes now Joseph Sunnen, the petitioner above named, by his attorney, C. Powell Fordyce, and for reply to the allegations affirmatively set forth by the respondent in his answer filed herein, admits, denies, and alleges as follows:

G. Admits that the income tax deficiencies determined by the respondent in his notice of deficiency, a copy of which is attached to the petition as Exhibit "A", amount to $5,067.11 for 1937, and $4,533.01 for 1938; but denies that the five year period of limitations, under Section 275 (c) of the Revenue Acts of 1936 and 1938, is applicable for the assessment and collection of said income tax deficiencies for 1937 and 1938.

G. (1) Admits that for the taxable year 1937 petitioner filed with the Collector of Internal Revenue for the First [fol. 34] District of Missouri an individual income tax return wherein he reported gross income of $38,992.40; but denies the remaining allegations contained in subparagraph (1) of paragraph G of respondent's answer.

G. (2) Denies the allegations contained in subparagraph (2) of paragraph G of respondent's answer.

G. (3) Denies the allegations contained in subparagraph (3) of paragraph G of respondent's answer.

G. (4) Denies the allegations contained in subparagraph (4) of paragraph G of respondent's answer.

G. (5) Denies the allegations contained in subparagraph (5) of paragraph G of respondent's answer.

G. (6) Admits the allegations contained in subparagraph (6) of paragraph G of respondent's answer.

G. (7) Denies the allegations contained in subparagraph (7) of paragraph G of respondent's answer.

G. (8) Denies the allegations contained in subparagraph (8) of paragraph G of respondent's answer.

G. (9) Denies the allegations contained in subparagraph (9) of paragraph G of respondent's answer.

G. (10) Denies the allegations contained in subparagraph (10) of paragraph G of respondent's answer.

H. Denies generally and specifically each and every allegation contained in respondent's answer not hereinbefore specifically admitted, qualified, or denied.

[fol. 35] Wherefore, petitioner prays that the affirmative relief requested by the respondent in his answer be denied; and that petitioner be granted the relief requested by him in his said petition.

C. POWELL FORDYCE,
Counsel for Petitioner,
506 Olive Street,
St. Louis 1, Missouri.

Dated: December 27, 1944.

[fol. 36] Stipulation of Facts.

(Filed at Hearing at St. Louis, Mo., on March 19, 1945, The Tax Court of the United States).

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled proceeding, that the following facts are true and may be found as facts by The Tax Court of the United States, subject to the right of either party to introduce evidence of other facts not inconsistent with the facts herein agreed to:

1. Petitioner is an individual whose address is 400 South Warson Road, Clayton, Missouri. Petitioner filed his Federal income tax returns for the calendar years of 1937, 1938, 1939, 1940, and 1941 with the Collector of Internal Revenue, First District, Missouri; and duly paid to said Collector the income taxes shown to be due by said returns.

2. In his aforesaid income tax return for said years the petitioner reported his income upon the cash receipts and disbursements basis.

[fol. 37] 3. Sunnen Products Company, hereinafter referred to for convenience as "the Company", is a Missouri corporation having its principal place of business in St. Louis, Missouri; and during the years here involved was engaged in the business of manufacturing and selling patented grinding machines and other tools. The capital stock of the Sunnen Products Company during the taxable years 1937 to 1941, inclusive, was held as follows:

1780	shares	Joseph Sunnen, President, Petitioner
200	"	Cornelia Sunnen, Petitioner's wife
18	"	W. A. Douglas, Vice-President
1	"	Comptroller
1	"	Production Manager
2000	"	Total shares outstanding

4. During the years mentioned above Cornelia Sunnen was, and is now, the petitioner's wife.

5. On or about November 17, 1927 petitioner filed with the United States Patent Office an application number 233,788 for a patent upon a device invented by him as a Cylinder Grinder, or as a Honing Device for Cylinders, said device being hereinafter for convenience referred to as Cylinder Grinder. Said application was allowed on December 4, 1934, and United States Patent No. 1,982,836 was issued to petitioner, who remained the owner thereof during the aforesaid years of 1937-1941, both inclusive.

[fol. 38] 6. On January 10, 1928 petitioner and the company duly executed a license agreement whereby petitioner licensed the company to manufacture and sell said Cylinder Grinder for a period of ten years, and the com-

pany agreed to pay him a royalty of ten percent of the gross sale price of said devices. A true and correct copy of said agreement is attached hereto as Exhibit 1A. Said agreement is hereinafter referred to as the original Cylinder Grinder License Agreement.

7. On or about January 8, 1929 petitioner signed a statement on the back of said original Cylinder Grinder License Agreement (see Exhibit 1A, p. 2) by which he purported to assign to his wife all royalties which should accrue under said agreement. A statement also appears on the back of said agreement (see Exhibit 1A, p. 2) to the effect that the agreement itself had been assigned to petitioner's wife. On January 15, 1929 petitioner delivered to the company a letter stating that he had assigned to his wife all of his interest in said original Cylinder Grinding License Agreement. A true and correct copy of said letter is attached hereto as Exhibit 2B. On December 21, 1931 petitioner delivered to the company another letter notifying it that he had executed a new assignment to his wife of his interest in said original Cylinder Grinder License Agreement, which confirmed in all respects his previous assignments—a true and correct copy of said letter being attached hereto as Exhibit 3C. In said letter of December 21, 1931 petitioner enclosed a copy of said new [fol. 39] assignment, the executed original copy of said new assignment having been delivered to his said wife. A true and correct copy of said new assignment is attached hereto as Exhibit 4D. The instruments mentioned in this paragraph were construed and considered by the United States Board of Tax Appeals in proceedings entitled Joseph Sunnen vs. Commissioner of Internal Revenue Docket Nos. 64117, 69526, and 74077, which proceedings involved petitioner's liability to pay income taxes on said royalties for the calendar years of 1929, 1930, and 1931. The opinion and decision of the Board of Tax Appeals in the aforesaid proceedings may be considered by the United States Tax Court in this proceeding, to the same extent as if introduced in evidence herein.

8. On or about December 4, 1931, petitioner filed with the United States Patent Office an application numbered 578,923 for a patent upon another device invented by him known as a Pinhole Grinder, or as a Bushing Grinder, said

device being hereinafter for convenience referred to as a Bushing Grinder. Said application was allowed on June 13, 1933, and United States Patent No. 1,913,689 was issued to petitioner, who remained the owner thereof during the years of 1937-1941, both inclusive.

9. On December 5, 1931 petitioner and the company duly executed a license agreement whereby petitioner licensed the company to manufacture and sell said Bushing Grinder for a period of ten years, and the company agreed to pay him a royalty of ten percent upon the gross [fol. 40] sales price of said device. A true and correct copy of said agreement is attached hereto as Exhibit 5E. Said agreement is hereinafter for convenience referred to as said Bushing Grinder License Agreement.

10. On or about December 5, 1931 petitioner delivered to the company a letter notifying it that he had assigned all of his right, title, and interest in said Bushing Grinder License Agreement to his wife—a true and correct copy of said letter being attached hereto as Exhibit 6F. In said letter of December 5, 1931 petitioner enclosed a copy of said assignment, the original assignment being delivered to his wife. A true and correct copy of said assignment is attached hereto as Exhibit 7G.

11. On January 10, 1938 said original Cylinder Grinder License Agreement expired; and petitioner and the company duly executed a renewal license agreement whereby petitioner licensed the company to manufacture and sell said cylinder Grinder until December 4, 1951—the date when said Cylinder Grinder patent expired—, in consideration of the company agreeing to pay him a royalty of ten percent of the gross sales price of said Cylinder Grinder during said period. A true and correct copy of said renewal agreement is attached hereto as Exhibit 8H. Said renewal agreement is hereinafter referred to as the Renewal Cylinder Grinder License Agreement.

[fol. 41] 12. On or about January 10, 1938 petitioner delivered to the company a letter notifying them that he had assigned all of his right, title, and interest in said renewal Cylinder Grinder License Agreement to his wife—a true and correct copy of said letter being attached hereto as Exhibit 9I. In said letter of January 10, 1938, petitioner

enclosed a copy of said assignment, the original assignment being delivered to petitioner's wife. A true and correct copy of said assignment is attached hereto as Exhibit 10J.

13. On or about May 22, 1939 petitioner filed with the United States Patent Office an application numbered 275,092 for a patent upon another device invented by him known as a Crankshaft Grinder; and petitioner had also then invented, and had in preparation, an application for another patent on a device also known as a Crankshaft Grinder. The aforesaid patent application No. 275,092 was allowed on May 6, 1941, United States Patent No. 2,240,527 was issued thereon to petitioner, and after issuance thereof petitioner remained the owner of said patent through the year 1941. The second patent application mentioned above was filed on December 29, 1939, was numbered 311,669, was allowed on January 26, 1943, when Patent No. 2,309,615 was issued to petitioner's wife as assignee of petitioner. The second patent application numbered 311,669 was assigned by petitioner to his wife on December 29, 1942.

14. On June 20, 1939 petitioner and the company duly executed a license agreement whereby petitioner licensed [fol. 42] the company to manufacture and sell said Crankshaft Grinder for a period of ten years, and the company agreed to pay him a royalty of ten percent upon the gross sale price of said devices. A true and correct copy of said agreement is attached hereto as Exhibit 11K. Said agreement is hereinafter referred to as said Crankshaft Grinder License Agreement.

15. On or about June 20, 1939 petitioner delivered to the company a letter notifying it that he had assigned all of his right, title, and interest in said Crankshaft Grinder License Agreement to his wife—a true and correct copy of said letter being attached hereto as Exhibit 12L. In said letter of June 20, 1939 petitioner enclosed a copy of said assignment, the original assignment being delivered to petitioner's wife. A true and correct copy of said assignment is attached hereto as Exhibit 13M.

16. All of the above-mentioned assignments of license agreements by petitioner to his wife were made by peti-

tioner as gifts to his wife and the assignments were without consideration. All of such gifts made after 1932 were reported by petitioner for gift tax purposes, he having filed gift tax returns in connection therewith.

17. Pursuant to the above-mentioned license agreements and assignments the company paid to petitioner's wife the royalties mentioned below:

[fol. 43]

Royalties Paid on	1937	1938	1939	1940	1941
A. Cylinder Grinder (1928 Contract)	$4,881.35				
B. Cylinder Grinder (1938 Contract)		$3,529.21	$3,713.83	$4,951.73	$6,821.97
C. Bushing or Pinhole Grinder	15,518.68	13,789.59	15,780.50	23,259.10	123,565.38
D. Crankshaft Grinders			5,749.44	22,281.67	18,615.43
Totals	$20,400.03	$17,318.80	$25,243.77	$50,492.50	$149,002.78

Petitioner's wife included the aforesaid royalties in her Federal income tax returns for the years in which she received the same, and duly paid income taxes on said royalties. Said income taxes have not been refunded to her.

18. In connection with the determination of petitioner's income tax liability for the calendar year of 1937, petitioner and respondent duly executed a Consent dated February 27, 1943, a true and correct copy of which is attached hereto as Exhibit 14N; and petitioner and respondent also duly executed a Consent dated May 9, 1944, a true and correct copy of which is attached hereto as Exhibit 15-O.

19. In connection with the determination of petitioner's income tax liability for the calendar year of 1938, petitioner and respondent duly executed a Consent dated January 6, 1944, a true and correct copy of which is attached hereto as Exhibit 16P.

[fol. 44] 20. If this court should decide that the above-mentioned royalties paid to petitioner's wife in 1937 and

1938 are taxable to petitioner, then Sections 275(c) of the Revenue Acts of 1936 and 1938 are applicable in determining the time limit within which respondent could assess additional income taxes against petitioner for the years of 1937 and 1938; and, because of the the execution by petitioner and respondent of the Consents mentioned above (Exhibits 14N, 15-O, and 16P), the applicable statute of limitations had not run as to the years of 1937 and 1938 when the respondent, on June 28, 1944, assessed against petitioner deficiency income taxes of $5,067.11 and $4,533.01, for the calendar years of 1937 and 1938, respectively. The income tax return of petitioner for 1937 showed gross income in the amount of $38,992.40 and his return for 1938 showed gross income in the amount of $45,625.36. The amounts of income in controversy which were not included in the gross income reported on said returns were $20,400.03 for the year 1937 and $17,318.80 for the year 1938, as shown under paragraph 17 hereof.

21. Petitioner's income tax return for 1937 was filed on March 16, 1938; and petitioner's income tax return for 1938 was filed on March 15, 1939.

[fol. 45] 22. At no time during the calendar years of 1937-1941, both inclusive, or prior thereto has the petitioner, or his wife, or the company given any notice of his, her, or its desire to cancel any of the above-mentioned license agreements; and at no time during said calendar years or prior thereto has the company given any notice to petitioner or his wife of its intent to cease manufacturing the patented devices mentioned in said license agreements. Said license agreements remained in effect during said period in accordance with their terms.

23. All of the aforesaid license agreements, Exhibits 1A, 5E, 8H, and 11K, were submitted to the board of directors of the company (Sunnen Products Company) before execution thereof on its behalf; and by vote at a directors' meeting all directors, (except petitioner who was present but did not vote) approved and directed the execution of said license agreements by the officers of the company whose respective names are affixed to said agreements.

24. During the calendar years of 1937-1941, both inclusive, the directors of the company, who were respectively

elected to serve for terms of one year at the annual meeting of the stockholders held on the second Tuesday in January of each year, consisted of the following persons: (1) petitioner, (2) petitioner's wife, (3) W. A. Douglass, (4) C. J. Schuepbach, and (5) R. S. Nichols. A vote of three of said directors was required in order to take any action binding upon the company.

[fol. 46] 25. The manufacture and sale of the patented devices mentioned in the aforesaid license agreements constituted more than half of the business of the company during the calendar years of 1937-1941, both inclusive.

26. The wages and salaries paid by the company, and the number of employes to whom the same were paid (exclosive of executive officers), are shown in the following table:

Year	Number of Employees at End of Year	Total Salaries and Wages Paid
1937	90	$189,612.68
1938	101	193,584.65
1939	99	202,534.41
1940	132	266,522.38
1941	220	372,3[illegible].49

27. During the years shown below the company as of December 31st of such years, owed its creditors the following amounts:

Year	Owed Creditors
1937	$123,623.07
1938	116,071.45
1939	152,209.99
1940	188,925.67
1941	574,725.64

C. POWELL FORDCE,
Counsel for Petitioner.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

[fol. 47] Exhibit 1-A.

Royalty Agreement.

This Agreement, made and entered into this 10th day of January, 1928, by and between the Sunnen Products Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, Party of the First Part, and Joe Sunnen of the City of St. Louis, Missouri, Party of the Second Part, Witnesseth, that

Whereas, Joe Sunnen has invented and has applied for a patent on a device known as "cylinder grinders" for use in connection with automobile engines, the application for said Letters Patent being No. 233788, and

Whereas, the corporation is desirous of manufacturing, selling and distributing said device, it is hereby agreed between the parties hereto that the said Joe Sunnen does hereby grant and give to the Sunnen Products Company the right, license and privilege to manufacture and sell said device in the United States and foreign countries, in consideration of which the Sunnen Products Company agrees to pay to the said Joe Sunnen ten percent. (10%) of the gross sales price of said device as the same are manufactured, sold and collected for.

It is further agreed between the parties hereto that either party shall have the right, without liability for damages or breach, to cancel this license or to cease manufacturing thereunder upon six months' notice in writing to the other party. In the absence of such cancellation, this Agreement shall be and continue in force for a period of ten (10) years from the date hereof.

In Witness Whereof, the parties hereto have caused this Agreement to be executed this 10th day of January, 1928.

SUNNEN PRODUCTS COMPANY,

(Sunnen Products Seal) By Matt Sunnen, Party of the First Part.

Joe Sunnen,

Party of the Second Part.

[fol. 48] January 8, 1929.

For value received I hereby sell, assign, and transfer to Mrs. Cornelia Sunnen, all my rights title and interest in

and to the Royalty which shall accrue hereafter to me on the within Royalty contract.

JOE SUNNEN.

Royalty Lease.
Standard Cylinder Grinder.
Assigned to Cornelia Sunnen.

Jan. 8-1929.

[fol. 49] Exhibit 2-B.

Sunnen Products Co.
7900 Manchester Ave.,
St. Louis, Mo.

January 15, 1929.

Sunnen Products Co.
6417 Dale Ave.
St. Louis, Mo.

Gentlemen:—

Confirming verbal notice given you at the annual stockholders meeting held at the Company's offices on January 8th, 1929, I have for value received assigned to Cornelia Sunnen, all my rights, title and interest in the royalty contract covering "cylinder grinders", covered by letter patent No. 233788, said contract dated the 10th day of January, 1928.

Yours truly,

JOE SUNNEN.

[fol. 50] Exhibit 3-C.

St. Louis, Missouri
December 21, 1931.

Sunnen Products Co.,
7900 Manchester Ave,
St. Louis, Mo.

Gentlemen:

Mr. Murphy, representative of the United States Commissioner of Internal Revenue, has raised some question as to the completeness and sufficiency of my assignment of January 3, 1929 of my interest in the royalty contract between the company and myself, dated January 10, 1928.

I have this day executed a new assignment, confirming in all respects the previous assignment, and herewith notify you to pay the royalties accruing under said royalty contract during the year 1931 direct to Mrs. Cornelia Sunnen. Copy of new assignment is herewith attached.

Yours very truly,

JOE SUNNEN.

Notice received December 21, 1931.

SUNNEN PRODUCTS COMPANY,
By W. A. Douglass, Vice-President.

[fol. 51] Exhibit 4-D.

Assignment Of Royalty Contract.

Whereas, the undersigned, on January 3, 1929, for valuable consideration, assigned to Cornelia Sunnen all of his right, title and interest in and to a royalty contract dated January 10, 1928, between the undersigned and the Sunnen Products Company, and

Whereas, the said Cornelia Sunnen has seen fit to permit the undersigned to collect for her and on her behalf the royalties accruing after the date of said contract, during the calendar years 1929 and 1930, and

Whereas, the undersigned has heretofore acknowledged himself indebted to said Cornelia Sunnen for said royalties so collected, and

Whereas, the United States Commissioner of Internal Revenue, through his representative, has raised some question as to the sufficiency and completeness of said assignment,

Now, Therefore, in consideration of the premises and in consideration of the original consideration of said assignment, I hereby in all respects confirm said previous assignment and by this instrument do assign, transfer, set over and deliver to Cornelia Sunnen all of my right, title and interest in and to said royalty contract of January 10, 1928 between myself and said Sunnen Products Company, relating to the manufacture of the cylinder grinder described

in said royalty contract, for the calendar year 1931, particularly. And I hereby state that the royalties accruing under said royalty contract have heretofore been and are hereafter the sole and exclusive property of the said Cornelia Sunnen, and hereby declare that said royalties shall be paid to the said Cornelia Sunnen or to her order, and that she shall have the sole right to collect, receive, receipt for, retain or sue for said royalties.

In Witness Whereof, I have caused these presents to be executed this 21st day of December, 1931.

JOE SUNNEN

State Of Missouri,
City Of St. Louis.—ss.:

Personally appeared before me, Joe Sunnen, to me known to be the person who executed the foregoing instrument and who acknowledged that he executed the same as his free act and deed.

In Witness Whereof, I have caused these presents to be executed this 21st day of December, 1931.

LUCY M. STEIDLE,
(Notarial Seal) Notary Public.

My commission expires on the 10 day of January 1934.

[fol. 52] Exhibit 5-E.

Royalty Lease.

This Agreement, made and entered into this 5th day of December, 1931 by and between Sunnen Products Company, a corporation organized and existing under the laws of the State of Missouri, hereinafter called the "Corporation" Party of the First Part, and Joe Sunnen of the County of St. Louis, State of Missouri, Party of the Second Part, Witnesseth That:

Whereas, Joe Sunnen has invented a device for use in connection with repairing automobile engines, known as a "pin hole grinder", and has applied for a patent thereon on December 4, 1931, said application bearing Serial No. 578,923, and

Whereas, the Corporation has heretofore used said device since October 1, 1931, with the consent of the said Joe Sunnen, and

Whereas, the Corporation is desirous of manufacturing, selling and distributing said device, it is hereby agreed between the parties hereto that the said Joe Sunnen does hereby grant and give to the Sunnen Products Company the right, license and privilege to manufacture and sell said device in the United States and Foreign countries, in consideration of which the Sunnen Products Company agrees to pay to the said Joe Sunnen ten percent (10%) of the gross sales price of said device as the same are manufactured, sold and collected for, including those heretofore sold.

It is further agreed between the parties hereto that either party shall have the right, without liability for damages or breach, to cancel this license or to cease manufacturing thereunder upon one year's notice in writing to the other party. In the absence of such cancellation, this Agreement shall be and continue in force for a period of ten (10) years from the date hereof.

In Witness Whereof, the Party of the First Part has caused these presents to be executed by its duly authorized officers, and its corporate seal to be hereunto affixed, and the Party of the Second Part has hereunto set his hand and seal this 5th day of December, 1931.

SUNNEN PRODUCTS COMPANY,
By W. A. Douglass, Vice-President.
Party of the First Part.

JOE SUNNEN,
Party of the Second Part.

Attest:
CORNELIA SUNNEN,
Secretary.

Sunnen Products Company
Seal

[fol. 53] Exhibit 6-F.

St. Louis, Missouri

December 5, 1931.

Sunnen Products Company,
7900 Manchester Ave.,
St. Louis, Missouri.

Gentlemen:

You are hereby notified that I have assigned all my right, title and interest under royalty contract dated December 5, 1931 between myself and your company, covering the device known as a "pin hole grinder", bearing Serial No. 578,923, to Cornelia Sunnen, and I hereby direct you to pay all royalties heretofore or hereafter accruing under said royalty contract to Mrs. Cornelia Sunnen.

Copy of said assignment is herewith enclosed.

Yours very truly,

JOE SUNNEN.

Received notice and copy of assignment this 5th day of December, 1931.

SUNNEN PRODUCTS COMPANY,
By W. A. Douglass, Vice-President.

[fol. 54] Exhibit 7-G.

Assignment Of Royalty Lease And Royalty Payments To Be Due Thereunder.

In Consideration Of the sum of One Dollar ($1.00) and of other valuable consideration, the receipt whereof is hereby acknowledged, I, the undersigned, do hereby assign, transfer, set over and deliver to Cornelia Sunnen all of my right, title and interest in and to a royalty contract this day executed between myself and the Sunnen Products Company covering a device for use in connection with repair-

ing automobile engines, known as a "pin hole grinder", patent application for which bears Serial No. 578923, together with the sole right to collect and receive any royalties heretofore or hereafter accruing under said royalty agreement, the same to be collected and received by her as her sole and exclusive property, and I hereby direct that the Sunnen Products Company shall pay all royalties accrued and hereafter accruing under said contract to the said Cornelia Sunnen or to her order.

In Witness Whereof, I have caused these presents to be executed this 5th day of December, 1931.

JOE SUNNEN.

State Of Missouri,
City Of St. Louis.—ss.:

Personally appeared before me, Joe Sunnen, to me known to be the person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In Witness Whereof, I have here unto set my hand and affixed my notarial seal this 5th day of December, 1931.

My commission expires 1-10-34.

LUCY M. STEIDLE,
(Seal) Notary Public.

[fol. 55] Exhibit 8-H.

Renewal Of Royalty Lease Agreement,

This Agreement, made and entered into this 10th day of January, 1938, by and between the Sunnen Products Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, Party of the First Part, and Joe Sunnen, of the County of St. Louis, State of Missouri, Party of the Second Part, Witnesseth: that

Whereas, on November 17, 1927, Joe Sunnen of the County of St. Louis and State of Missouri, made application to

the Commissioner of Patents of the United States for Letters Patent on a "Honing Device For Cylinders", for use in connection with automobile engines, which said application, bearing Serial No. 233788, was allowed by said Commissioner of Patents on December 4, 1934, and issued as United States Letters Patent No. 1,982,836, said Joe Sunnen being the sole owner thereof; and

Whereas, said Joe Sunnen under date of January 10, 1928, entered into a royalty agreement with the Sunnen Products Company whereby, for and in consideration of the payment to said Joe Sunnen of ten percent (10%) of the gross sales price of said device, as the same was manufactured, sold and collected for, the said Sunnen Products Company was granted the right, license and privilege to manufacture and sell said device in the United States and foreign countries for a term of ten (10) years beginning on the 10th day of January, 1928, and ending on the 10th day of January, 1938; and which has now expired; and

Whereas, the said Sunnen Products Company desires to renew said royalty lease and Joe Sunnen is agreeable to such renewal for the remainder of the life of the patent, that is until December 4, 1951:

Now, Therefore, It is hereby agreed between the parties hereto, Sunnen Products Company, Party of the First Part, and Joe Sunnen, Party of the Second Part, that the said royalty lease may be and it is hereby renewed for the life of the patent, and the said Joe Sunnen does hereby grant and give to the Sunnen Products Company the right, license and privilege to manufacture and sell said above mentioned device in the United States and foreign countries; in consideration of which the said Sunnen Products Company agrees to pay to the said Joe Sunnen ten percent (10%) of the gross sales price of said device as the same is manufactured, sold and collected for.

It being further agreed between the parties hereto that either party shall have the right, without liability for damages or breach, to cancel this license or to cease manufacturing thereunder upon six month's notice in writing to the other party. In the absence of such cancellation, this

agreement shall be and continue in force for the life of the patent (December 4, 1951).

[fol. 56] In Witness Whereof the parties hereto have caused this agreement to be executed this 10th day of January, 1938.

SUNNEN PRODUCTS COMPANY
By W. A. Douglass, Vice-President,
Party of the First Part.

JOE SUNNEN,
Party of the Second Part.

Attest:
CORNELIA SUNNEN,
Secretary.

Sunnen Products Co.
Seal

[fol. 57] Exhibit 9-I.

St. Louis, Missouri
January 10, 1938

Sunnen Products Company
7900 Manchester Avenue
St. Louis, Missouri.

Gentlemen:

You are hereby notified that I have assigned all my right, title and interest under royalty contract renewal dated January 10, 1938 between myself and your company, covering the device known as "Honing Device For Cylinders" (Standard Cylinder Grinder), bearing United States Patent No. 1,982,836, to Cornelia Sunnen, and I hereby direct you to pay all royalties heretofore or hereafter accruing under said royalty contract to Mrs. Cornelia Sunnen.

Copy of said assignment is herewith enclosed.

Yours very truly,
JOE SUNNEN

Received notice and copy of
assignment this 10th day
of January, 1938.
SUNNEN-PRODUCTS COMPANY,
By W. A. Douglass,
Vice-President.

[fol. 58] Exhibit 10-J.

Assignment Of Royalty Lease And Royalty Payments To Be Due Thereunder.

In Consideration of the sum of One Dollar ($1.00) and of other valuable considerations, the receipt whereof is hereby acknowledged, I, the undersigned, do hereby assign, transfer, set over and deliver to Cornelia Sunnen all of my right, title and interest in and to a royalty contract this day executed between myself and the Sunnen Products Company covering a device for use in connection with repairing automobile engines, known as a "Honing Device for Cylinders" filed in the United States Patent Office under date of November 17, 1927, Serial No. 233,789, on which patent was allowed under date of December 4, 1934, U. S. Patent No. 1,982,836, together with the sole right to collect and receive any royalties heretofore or hereafter accruing under said royalty agreement, the same to be collected and received by her as her sole and exclusive property, and I hereby direct that the Sunnen Products Company shall pay all royalties accrued and hereafter accruing under said contract to the said Cornelia Sunnen or to her order.

The above mentioned Royalty lease is a renewal of a royalty lease heretofore entered into with the said Sunnen Products Company for a term of ten years beginning January 10, 1928 and ending January 10, 1938, which was also assigned to the said Cornelia Sunnen.

In Witness Whereof I have caused these presents to be executed this 10th day of January, 1938.

JOE SUNNEN

State Of Missouri,
City Of St. Louis.—ss.:

Personally appeared before me, Joe Sunnen, to me known to be the person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal this 10th day of January, 1938.

My commission expires.....

.....
Notary Public.

[fol. 59] Exhibit 11-K.

Royalty Agreement.

This Agreement, made and entered into this 20th day of June, 1939, by and between Sunnen Products Company, a corporation organized and existing under the laws of the State of Missouri, hereinafter called the "Corporation", Party of the First Part, and Joe Sunnen of the County of St. Louis, State of Missouri, Party of the Second Part, Witnesseth, that:

Whereas, Joe Sunnen has invented a device known as a Crankshaft Grinder for use in connection with repairing automobiles, and, on May 22nd, 1939, applied to the United States Patent Office for a patent thereon, said application bearing Serial No. 275,092, and has also invented and has in preparation application for another patent on device also known as a Crankshaft Grinder, which application is soon to be filed in the United States Patent Office; and

Whereas, the corporation is desirous of manufacturing selling and distributing said devices for which patent application has been made and is to be made, it is hereby agreed between the parties hereto that the said Joe Sunnen does hereby grant and give to the Sunnen Products Company the right, license and privilege to manufacture and sell said devices aforementioned in the United States and foreign countries; In Consideration of which the Sunnen Products Company agrees to pay to the said Joe Sunnen ten percent (10%) the gross sales price of said devices as the same are manufactured, sold and collected for, including those heretofore sold, if any.

It is further agreed between the parties hereto that either party shall have the right, without liability for damages or breach, to cancel this license or to cease manufacturing thereunder upon one year's notice in writing to the other party. In the absence of such cancellation, this agreement shall be and continue in force, in respect to both of the aforementioned Crankshaft Grinder devices, for a period of ten (10) years from the date hereof.

In Witness Whereof, the Party of the First Part has caused these presents to be executed by its duly authorized officers, and its corporate seal to be hereunto affixed, and

the Party of the Second Part has hereunto set his hand and seal this 20th day of Jun., 1939.

SUNNEN PRODUCTS COMPANY,
a corporation,

By W. A. Douglass Vice President.
Party of the First Part.

(Sunnen Product's Seal)

JOE SUNNEN,
Party of the Second Part.

Attest:
Cornelia Sunnen
Secretary.

[fol. 60] Exhibit 12-L.

St. Louis, Missouri
June 20, 1939

Sunnen Products Company
7900 Manchester Avenue
St. Louis, Missouri.

Gentlemen:

You are hereby notified that I have this date assigned all my right, title and interest under Royalty Agreement dated June 20, 1939, between myself and the Sunnen Products Company covering two devices, each known as a Crankshaft Grinder, to Cornelia Sunnen, and I hereby direct you to pay all royalties heretofore or hereafter accruing under said royalty contract on said two devices to Mrs. Cornelia Sunnen.

Patent application for the first of the above mentioned devices has been filed in the Patent Office of the United States under date of May 22, 1939, and bears Serial Number 275,092; patent application on the second of said de-

vices is now in preparation and soon to be filed in said United States Patent Office.

Copy of said agreement is hereto attached.

Very truly yours,

JOE SUNNEN.

Received notice and copy of assignment this 20th day of June, 1939.

SUNNEN PRODUCTS COMPANY,
a corporation,
By W. A. Douglass Vice-President.

[fol. 61] Exhibit 13-M.

Assignment Of Royalty Lease And Of Royalty Payments To Be Due Thereunder.

In Consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, I, the undersigned, Joe Sunnen, do hereby assign, transfer, set over and deliver to Cornelia Sunnen of St. Louis County, Missouri, all my right, title and interest in and to a royalty contract this day exeeuted between myself and the Sunnen Products Company covering two devices for use in connection with repairing automobiles, each of said devices being known as a Crankshaft Grinder; patent appplication for the first of which was made under date of May 22, 1939 and bears United States Patent Office application Serial Number 275,092, and patent application for the second of which devices is now in preparation and is soon to be filed in the said United States Patent Office; together with the sole right to collect and receive any royalties heretofore or hereafter accruing under said royalty agreement, the same to be collected and received by said Cornelia Sunnen as her sole and exclusive property, and I hereby direct that the Sunnen Products Company shall pay all royalties accrued and hereafter accruing under said contract to the said Cornelia Sunnen or to her order.

In Witness Whereof, I have caused these presents to be executed this 20th day of June, 1939.

JOE SUNNEN.

State Of Misouri,
City Of St. Louis—ss.:

This day before me personally appeared Joe Sunnen to me known and known to me to be the person who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal this 20th day of June, 1939.

My Commission expires July 9, 1941.

WILLIAM H. HELLWEGE,
(Seal) Notary Public.

[fol. 62] Exhibit 14-N.

Form 872 Duplicate
Treasury Department
Internal Revenue Service
(Revised April 1942)

Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax

Received
Feb. 26, 1943
Office
Internal Revenue Agent in Charge
St. Louis, Missouri

....., 19....

In pursuance of the provisions of existing Internal Revenue Laws Joseph Sunnen, a taxpayer (or taxpayers) of Clayton, Missouri, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year (or years) ended December 31, 1937, under existing acts, or under prior revenue acts, may be assessed

at any time on or before June 30, 1944, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

The time within which a tax may be assessed under the provisions of Section 275(a) of the Revenue Act of 1936 has already expired. This consent shall be ineffective, therefore, to validate the assessment of a deficiency in tax for the said taxable year unless the said deficiency is predicated on the inclusion in gross income of an amount omitted therefrom in the taxpayer's return, which is properly includable therein and which is in excess of 25% of the amount of gross income stated in the return, as provided in Section 275(c).

JOSEPH SUNNEN,
Taxpayer.[1]

.....
Taxpayer.[1]

[Seal[2]]

By.....

GUY T. HELVERING,
Commissioner of Internal Revenue.
By N B E Feb. 27, 1943
(Date)

---

[1]This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

[2]If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

[fol. 63] Exhibit 15-Q.

Form 872 Duplicate
Treasury Department
Internal Revenue Service
(Revised February 1943)

Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax

C:TS:WD
CTN

Received
May 10, 1944
Technical Staff
Western Division
Saint Louis Office

May 9, 1944.

In pursuance of the provisions of existing Internal Revenue Laws Joseph Sunnen, a taxpayer (or taxpayers) of Clayton, Missouri, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year (or years) ended December 31, 1937, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1944, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

The time within which a tax may be assessed under the provisions of Section 275(a) of the Revenue Act of 1936 has already expired. This consent shall be ineffective, therefore, to validate the assessment of a deficiency in tax for the said taxable year unless the said deficiency is predicated on the inclusion in gross income of an amount omitted therefrom in the taxpayer's return, which is properly includable therein, and which is in excess of 25% of the

amount of gross income stated in the return, as provided in Section 275(c).

.....

Taxpayer.[1]

JOSEPH SUNNEN,

Taxpayer.[1]

[Seal[2]]. By.....

JOSEPH D. NUNAN, JR.,
Commissioner of Internal Revenue.
By N W B May 11-1944
(Date)

[fol. 64] Exhibit 16-P.

Form 872 Duplicate
Treasury Department
Internal Revenue Service
(Revised February 1943)

Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax

C:TS:WD
CTN

Received
Jan. 8, 1944
Technical Staff
Western Division
Saint Louis Office

Jan. 6, 1944.

In pursuance of the provisions of existing Internal Revenue Laws Joseph Sunnen, a taxpayer (or taxpayers) of

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[1]This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

[2]If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

400 South Warson Road, Clayton, Missouri, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year (or years) ended December 31, 1938, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1945, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

The time within which a tax may be assessed under the provisions of Section 275(a) of the Revenue Act of 1936 has already expired. This consent shall be ineffective, therefore, to validate the assessment of a deficiency in tax for the said taxable year unless the said deficiency is predicated on the inclusion in gross income of an amount omitted therefrom in the taxpayer's return, which is properly includable therein and which is in excess of 25% of the amount of gross income stated in the return, as provided in Section 275(c).

.....

Taxpayer.[1]

.....

Taxpayer.[1]

[Seal[2]]

By Joseph Sunnen,

Robert E. Hannegan,
Commissioner of Internal Revenue.

By N W B Jan. 10, 1944
(Date)

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[1]This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

[2]If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of

[fol. 65] Excerpts from the Transcript of Testimony before The Tax Court of the United States at St. Louis, Missouri, on March 19, 1945.

(Filed March 29, 1945, The Tax Court of the United States).

Joseph Sunnen, Petitioner,
Docket No. 6089 vs.
Commissioner Of Internal Revenue, Respondent.

JOHN O. PRICE called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Fordyce:

Q. State your name, please.

A. John O. Price.

Q. What is your profession, Mr. Price?

A. Certified Public Accountant.

Q. Mr. Price, have you gone over the books and records of the Petitioner's wife, Mrs. Cornelia Sunnen?

A. Yes, sir.

Q. What would you say as to her net worth in the years of 1937, '38, '39, '40 and '41?

Mr. Hormberg: I think probably the records would be the better evidence. I don't know that I should allow this testimony to go in as being the best evidence and I will object to it.

[fol. 66] The Court: Do you have the books?

Mr. Fordyce: No, Your Honor, but Mr. Price has gone over the books and is thoroughly familiar with the books as the auditor of her assets and I want him to testify, not with any idea of proving exactly what she owns or did own at that time, but what her books showed.

The Court: Of course, the books would be the best evidence. He may testify what he found and reported but it

such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

is not the best evidence of what the condition of the books are since they are available.

Mr. Fordyce: May he testify what he found?

The Court: He may.

Q. According to your examination, what did you find that the books showed in regard to Mrs. Sunnen's net worth at the end of each of those years?

A. At the end of 1937, $192,773.00; at the end of 1938, $192,349.00; at the end of 1939, the amount was $203,236.00; at the end of 1940, the amount was $186,037.00; at the end of 1941, 134,053.00.

Mr. Fordyce: That is all.

Cross-Examination.

By Mr. Hormberg:

Q. Mr. Price, you audit the books of Mrs. Sunnen, the wife of the petitioner in this proceeding?

A. I do not at this time. I did up through 1940.

Q. What did those books reveal as to whether Mrs. Sunnen had an account with Mr. Sunnen and as to whether she loaned money to him, or he borrowed from her or [fol. 67] whether she borrowed from him?

A. I couldn't answer that exactly; that's been a long time ago. I would have to look it up.

Q. Do you know whether she loaned any sums of money to the petitioner during the taxable years?

Mr. Fordyce: Are you asking in regard to these years involved?

Mr. Hormberg: Yes, sir, 1937 to 1941.

A. I couldn't answer that.

Q. You don't know whether she returned or loaned any of this royalty from the Simmons Products Company to Mr. Sunnen?

A. I couldn't testify to that.

Q. You don't know?

A. No, I don't know right now. The report would show. I was not asked to prepare to answer that question and it has been a long time ago.

Q. Do you know whether the record shows whether she loaned the petitioner, or allowed the petitioner to collect

any of those royalties that she was entitled to under that assignment of the contract, whether she allowed the collection to be made by her husband?

A. Money due her, allowed it to be paid to him?

Q. Yes?

A. I have no recollection of that happening.

Mr. Hormberg: That's all.

The Court: You are excused.

(Witness excused.)

[fol. 68] (Opinion of The Tax Court of the United States in Cases Nos. 64117, 69526 and 74077.)

United States Board Of Tax Appeals.

Joseph Sunnen, Petitioner, v. Commissioner Of Internal Revenue, Respondent.

Docket Nos. 64117, 69526, 74077.

The right to receive royalty under a royalty contract relating to the manufacture and sale of a certain device known as a "cylinder grinder" is a property right, and when such contract is assigned the royalties thereafter payable thereunder are income to the assignee and not to the assignor and inventor of such device.

Thomas H. Cobbs Esq., for petitioner.

T. M. Mather, Esq., for the respondent.

MeMahon: These proceedings, duly consolidated for hearing and decision, are for the redetermination of asserted deficiencies in income tax as follows:

Year	Amount
1929	$8,388.43
1930	5,642.83
1931	4,256.14

The only question at issue is whether certain royalty income of $41,084.22, $28,097.62, and $23,108.28, returned as income for the years 1929, 1930 and 1931 by Cornelia Sunnen, wife of petitioner, is includable in the gross income of petitioner for the taxable years involved.

The facts were stipulated by the parties. We adopt stipulation as our findings of fact setting forth only those facts necessary to an understanding of the question presented.

[fol. 69] The petitioner was, during each of the taxable years, the president and record owner, with the exception of qualifying shares, of all of the capital stock of the Sunnen Products Company, a corporation, hereinafter referred to as the Company.

The petitioner had invented several devices which were being manufactured and sold by the Company under royalty agreements, and in particular, a device known as a "cylinder grinder", patented under United States Patent #233788.

Under date of January 10, 1928, the petitioner entered into an agreement with the Company whereby he granted to such Company the right, license and privilege to manufacture and sell such device known as "cylinded grinder" for a period of ten years from date thereof in the United States and foreign countries in consideration of the payment to petitioner of ten per cent of the gross sales price of such device as the same are manufactured, sold and collected for, each party having the right to cancel "this license or to cease manufacturing thereunder upon six months' notice in writing to the other party".

Under date of January 8, 1929, the petitioner executed the following assignment on the back of the above contract:

* * * * * *

For value received I hereby sell, assign, and transfer to Mrs. Cornelia Sunnen, all my rights title and interest in and to the Royalty which shall accrue hereafter to me on the within Royalty contract.

* * * * * *

Upon the back of such contract there also appears the following notation:

[fol. 70]

Royalty Lease
Standard Cylinder Grinder
Assigned to Cornelia Sunnen
Jan. 8—1929.

Under date of January 8, 1929, the Company was advised of such assignment as appears from the minutes of the

annual meeting of the board of directors of the Company held January 8, 1929 as follows:

Verbal notice was given by Mr. Joe Sunnen that he had assigned to Cornelia Sunnen, his right to receive the royalty payments called for under his royalty contract of January 10, 1928 with the Sunnen Products Company for the manufacture of the cylinder grinders and that after this date all royalty payments should be made to Cornelia Sunnen and that written notice of said assignment would be duly served upon the Company.

Under date of January 15, 1929, the petitioner addressed and signed a letter to the Company stating as follows:

* * * * * *

Confirming verbal notice given you at the annual stockholders meeting held at the Company's offices on January 8th, 1929, I have for value received assigned to Cornelia Sunnen, all my rights, title and interest in the royalty contract covering "cylinder grinders", covered by letter patent No. 233788, said contract dated the 10th, day of January 1928.

* * * * * *

During the year 1929, the petitioner's account with the Company was largely overdrawn and, upon verbal instructions from Cornelia Sunnen, assignee, given to the Company, the royalties accruing under the cylinder grinder patent were credited on the books of the Company to Joseph Sunnen, and the entire royalty from the agreement of January 10, 1928, was so credited to the account of the petitioner.

During the calendar year 1929 the petitioner's account with the Company was credited with royalties in the amounts of $29,385.06 and $23,418.87, which constitute total [fol. 71] royalties on all royalty contracts. The balance due the Company from the petitioner at the end of 1929, even with these credits, was $73,132.67. The cylinder grinder sales for 1929 totaled $410,842.20, and the royalty of $41,084.22 is included in the above 1929 credits to petitioner's account.

The petitioner charged himself on his personal books with $41,084.22 and credited such amount to the account of Cornelia Sunnen on his personal books.

On or about March 14, 1930, C. J. Schuepbach, bookkeeper of the Company, who is not an accountant and who did not prepare the income tax return for the petitioner or Cornelia Sunnen, mailed to the United States Collector in St. Louis, Form 1099, showing an amount paid to petitioner by the Company, including therein in error the amount of $41,084.22.

The income tax returns for petitioner, for his wife, and for the Company were prepared by a certified accountant who examined the minutes and records, and upon these prepared by a certified accountant who examined the i2dd prepared the three returns. The income tax return of the Company showed the amount paid to petitioner as excluding above figure of $41,084.22; the income tax return of the petitioner excluded the above amount; and the income tax return of Cornelia Sunnen returned as income the amount of $41,084.22.

Petitioner had a personal bank account, but Cornelia Sunnen, his wife, had no bank account and was not authorized to draw checks upon the bank account of petitioner. Checks on petitioner's account were drawn, either by the petitioner or by C. J. Schuepbach, who had authority to sign petitioner's name to checks on petitioner's personal [fol. 72] account, and by far the greater number of checks on his account were drawn by C. J. Schuepbach. C. J. Schuepbach had instructions from the petitioner to draw checks to Cornelia Sunnen, or on her order, to any other person at any time and in any amount. Following these instructions, C. J. Schuepbach did draw checks in payment of all the bills of Cornelia Sunnen as presented to him, without supervision by petitioner, and delivered checks to Cornelia Sunen payable to her, or to "cash", whenever desired.

Petitioner, during the calendar year 1930, was overdrawn in his account with the Company and, following verbal instructions from Cornelia Sunnen the royalties under the cylinder grinder patent were again credited to petitioner, and, at the end of the calendar year, even with the credits

of the royalty due to Cornelia Sunnen, petitioner's account was overdrawn $86,878.60.

Petitioner's account was credited on the books of the Company with $32,121.07, and $16,153.80 for royalties for 1930. The Company, however, in crediting the petitioner with the royalty account for 1930, broke down the items credited to petitioner, showing the amounts thereof due to petitioner and his wife, respectively, and showing the amounts due to Cornelia Sunnen as $20,071.88 for the first six months and $8,025.74 for the last six months, or a total of $28,097.62 for the calendar year.

Form 1099, sent in by the Company for the year 1930, did not include this item as having been paid to petitioner.

Amounts were credited to Cornelia Sunnen on the books of the petitioner aggregating $28,097.62, as royalty for the year 1930.

In the calendar year 1931, the books of the Company [fol. 73] credited Cornelia Sunnen directly with the royalties on the cylinder grinder, in the amount of $23,108.28. In 1931, no credit was extended to Joseph Sunnen on the books of the Company for this item.

In Nelson vs. Ferguson, 56 Fed. (2d) 121, certiorari denied 286 U. S. 565, the taxpayer obtained letters patent on an invention and entered into a contract with the Warner Chemical Company for the exploitation of such invention, under which he was to receive a part of the realized net profits. Taxpayer executed a contract wherein he agreed to waive his rights to receive all profits from the manufacture and sale of his invention as outlined in his contract with the Warner Company in favor of his wife and agreed to and did notify such company in writing to pay to his wife all the moneys that may become due under his contract with it. The court held that the right to certain profits vested in the taxpayer, that being a vested property right, it would have constituted a part of the taxpayer's estate had he died, and that such property right was assignable, the court continuing:

The next questions are whether Nelson's property interest in the contract was assignable to his wife and, if so, whether it was assignable in the sense of so completely

divesting him of the property and vesting it in her, that thereafter the income arising from it was taxable not as his but as hers.

[5] In answering these questions it must be kept in mind that the thing assigned was not Nelson's future salary or personal earnings as in the Earl Case and in the later case of Luce vs. Burnet, Commissioner, 55 F. (2d) 751, Court of Appeals of the District of Columbia, January 18, 1932, things not then in existence, 5 Corpus Juris, 87, but was an existing thing, namely; property in a contract. The assignment being of property was therefore not merely an assignment of income when earned, though from the property assigned profits and income were expected to flow. * * * Whether to a stranger or wife, we think the income from it should have been taxed to the assignee, not to [fol. 74] the assignor who had ceased to own or control it, Corliss vs. Bowers, 281 U. S. 376, 50 S. Ct. 336, 74 L. Ed. 916; Mitchel vs. Bowers (C. C. A.) 15 F. (2d) 287; Harris vs. Commissioner (C. C. A.) 39 F. (2d) 546, * * *.

To the same effect are J. V. Leydig, 15 B. T. A. 124, affirmed in Leydig vs. Commr., 43 Fed. (2d) 1494; Field vs. Commr., 42 Fed. (2d) 820; Copland vs. Commr., 41 Fed. (2d) 501; Elizabeth D. Smith, et al., Executors, 25 B. T. A. 291.

In Lowery vs. Helvering, 70 Fed. (2d) 713, reversing Emily Gale Lowery, 27 B. T. A. 137, the Circuit Court of Appeals for the Second Circuit stated:

Cases like Lucas vs. Earl, supra, 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731, and Burnet vs. Leininger, supra, 285 U. S. 136, 52 S. Ct. 345, 76 L. Ed. 665, are to be explained on quite another theory. The choses in action there transferred were indeed as absolutely transferred as though they were unconditional in obligation; but they were conditional upon continued performance by the assignor, the original obligee. There is therefore a real propriety in looking to the obligee's performance as the source of the income, though strictly his control over it is only negative. * * * However, it is not of consequence now just what is the rational foundation of the doctrine, for it has never been held to apply where the consideration has been performed and

the right become absolute. In such situations an assignment is treated as completely stripping the assignor of his rights. * * *

See also Edward G. Swartz, Inc., 69 Fed. (2d) 633, affirming Edward G. Swartz, Inc., 25 B. T. A. 1065.

In this proceeding, considering not only the assignment but the verbal and written notice to the Company and the notation on the contract, it is our opinion that the petitioner assigned every interest he had in such contract. The royalties were not contingent upon the performance by the petitioner of any services or of any obligations under the contract. The right to receive the royalties under the agreement was a vested property right of petitioner which he as- [fol. 75] signed to his wife. The petitioner assigned the property or property right which produced the income. The principle of the Nelson case, supra, and other cases cited above, is applicable here.

The respondent in support of his position on brief cites Van Meter vs. Commissioner, 61 Fed. (2d) 817, affirming 22 B. T. A. 1202; Bishop vs. Commissioner, 54 Fed. (2d) 298, affirming 19 B. T. A. 1108; Parker vs. Routzahn, 56 Fed. (2d) 730, certiorari denied 53 S. Ct. 15; James M. Stokes, Jr., 22 B. T. A. 1386; and Hazel T. Powers, 23 B. T. A. 428, affirmed in Powers vs. Commissioner, 61 Fed. (2d) 625, certiorari denied 53 S. Ct. 404. All the above cases except the Powers case involve assignments of insurance renewal commissions. As stated in Van Meter vs. Commissioner, supra:

* * * There was no assignment of the agency contract. The Van Meter Company alone acted thereunder, and it alone produced the insurance business which was the basis or earnings of the renewals. The actual effect of the assignments was to transfer to the assignees what had been solely earned by the Van Meter Company and to authorize direct payment thereof to the assignees by the Hawkeye Company. What it did with its earnings cannot affect the application of the taxing statutes. * * *

Herein the contract was assigned, and although the petitioner invented the device, the royalties did not represent income of the petitioner for services to the Company, but

were due to the manufacture and sale by the Company of the cylinder grinders, which it had the right to manufacture under the contract. The petitioner was not the producer of the income; the contract was the source of the income.

In the Powers case the taxpayer "revocably assigned, with a restraint upon alienation, 'one third of the income of the trust estate' which she 'may be or may become entitled to'".

These cases, as well as Corliss vs. Bowers, 281 U. S. 336, involving the question of liability for tax on income from a revocable trust as between the grantor of the trust and the beneficiary; Edward J. Luce, 18 B. T. A. 923, involving a declaration of trust as to future income from certain sources including the partnership of which the grantor was a member; Mitchell vs. Bowers, 15 Fed. (2d) 287, certiorari denied 273 U. S. 759, involving an assignment of one-half of the earnings of taxpayer's partnership firm to his wife, Bing vs. Bowers, 26 Fed. (2d) 1017, involving the assignment of a portion of the net income and profits from the interest of the assignor in certain realty, and John Leo Stack, 22 B. T. A. 707, involving an assignment of net profits, compensation for services rendered by assignor all cited by respondent, are obviously distinguishable on the facts and therefore are not applicable here.

It is immaterial that the wife instructed the Company to credit the account of petitioner with the 1929 and 1930 royalties. They were hers. It was within her power to revoke such instructions at will.

It follows that the respondent erred in increasing petitioner's income for the years 1929, 1930 and 1931 by the amounts of the royalties of $41,084.22, $28,097.62, and $23,108.28, respectively.

In Docket No. 69526 involving the taxable year 1930, the respondent also increased petitioner's gross income by $900 salary, as to which there is no controversy, therefore

Decision will be entered for the petitioner in Docket Nos. 64117 and 74077, and under Rule 50 in Docket No. 69526.

(Seal)

Enter: Jun 29 1935

[fol. 77] (Order of Redetermination in Case No. 64117.)

United States Board Of Tax Appeals

Joseph Sunnen, Petitioner,
Docket No. 64117. vs.
Commissioner Of Internal Revenue, Respondent.

Decision.

Pursuant to the Memorandum Opinion of the Board entered June 25, 1935, and order of July 24, 1935, the respondent on July 31, 1935, having filed notice of settlement and proposed computation, and the petitioner on August 14, 1935, having filed an acquiescence in the computation as made by the respondent, now therefore, it is

Ordered And Decided that there is a deficiency in income tax of $586.45 for the year 1929.

EUGENE BLACK,
Member.

Enter: Aug. 17, 1935.

FBH

(Seal)

[fol. 78] (Order of Redetermination in Case No. 69526.)

United States Board Of Tax Appeals

Washington

Joseph Sunnen, Petitioner,
Docket No. 69526. vs.
Commissioner Of Internal Revenue, Respondent.

Decision.

Pursuant to the memorandum opinion entered in the above-entitled proceeding on June 29, 1935 counsel for the respondent having filed a proposed final determination with notice of settlement; due notice of hearing under Rule 50 having been served on counsel for the parties; counsel for the petitioner, on August 14, 1935, having filed acquiescence

to the proposed final determination of the respondent, now therefore, it is

Ordered and Decided: that there is a deficiency in income tax for the year 1930 in the amount of $108.68.

ERNEST H. VAN FOSSAN,
Member.

Enter: Aug. 16, 1935.

(Seal)

[fol. 79] (Order of Redetermination in Case No. 74077.)

United States Board Of Tax Appeals

Joseph Sunnen, Petitioner,
Docket No. 74077. vs.
Commissioner Of Internal Revenue, Respondent.

Decision.

Pursuant to the Memorandum Opinion of the Board entered June 29, 1935, and order of July 24, 1935, the respondent on July 31, 1935, having filed notice of settlement and proposed computation, and the petitioner on August 14, 1935, having filed an acquiescence in the computation as made by the respondent, now therefore, it is

Ordered And Decided: that there is a deficiency in income tax of $162.00 for the year 1931.

EUGENE BLACK,
Member.

Enter: Aug. 17, 1935

FBH

(Seal)

[fol. 80] (Opinion and Findings of Fact of The Tax Court of the United States.)

The Tax Court of the United States.

Joseph Sunnen, Petitioner,
Docket No. 6089. vs.
Commissioner of Internal Revenue, Respondent.

Promulgated March 11, 1946.

Petitioner, owner of certain patented inventions, licensed a corporation, in which he owned 1,780 and his

wife 200 shares of its outstanding capital stock, to manufacture and sell the devices under agreements to pay a royalty of 10 per cent of the gross receipts from the sales of each device. The license agreements were for a limited period and were mutually subject to cancellation without liability on giving a prescribed notice. The agreements were assigned to petitioner's wife to whom the royalties were thereafter paid. Held:

1. The plea of res adjudicata is applicable only to the extent of royalties in the sum of $4,881.35 paid in the taxable year 1937, under the licensing agreement of January 10, 1928.

2. The remaining royalties paid in the taxable years are taxable income to petitioner. Estate of J. G. Dodson, 1 T. C. 416, followed.

[fol. 81] C. P. Fordyce, Esq., for the petitioner.

Roy C. Hormberg, Esq., for the respondent.

This controversy involves income tax deficiencies as follows:

Year	Amount
1937	$ 5,067.11
1938	4,533.01
1939	7,994.77
1940	29,540.50
1941	103,227.18

The issues are: (1) whether petitioner is taxable on the royalties paid under agreements licensing certain of his patents after the assignment of such agreements to his wife; (2) whether the doctrine of res adjudicata is applicable; and (3) whether the deficiencies for the years 1937 and 1938 were determined within the time prescribed by law. All the material facts were stipulated and are so found. They are summarized as follows:

Findings of Fact.

Petitioner is an individual residing at Clayton, Missouri. His Federal income tax returns for the periods involved were filed on a calendar year cash basis with the collector of internal revenue for the first district of Missouri.

Sunnen Products Company, a Missouri corporation (hereinafter called the "Company"), during the taxable periods was engaged in the manufacture and sale of patented grinding machines and other tools. During such years its outstanding stock consisted of 2,000 shares. Petitioner was its president and held 1,780 shares of its capital stock. [fol. 82] Cornelia Sunnen, wife of petitioner, held 200 shares, and the remaining 20 shares were held by others connected with the company.

Petitioner was an inventor. He filed applications and was issued letters patent by the government of the United States on three devices or inventions. A description of the device, the date of the filing of the applications, the date of issue of the patents and the patent numbers are as follows:

Description	Date of Application	Number Assigned Patent	Date Patent Issued
(1) Cylinder Grinder	November 17, 1927	1,982,836	December 4, 1934
(2) Pinhole Grinder	December 4, 1931	1,913,689	June 13, 1933
(3) Crankshaft Grinder	May 22, 1939	2,240,527	May 6, 1941

The petitioner remained the owner of such patents throughout the year 1941.

On December 29, 1939, petitioner filed an application for a patent on another crankshaft grinder. This application was assigned by petitioner to his wife on December 29, 1942, and patent No. 2,309,615 was issued to her on January 26, 1943.

On the following respective dates, petitioner licensed the Company to manufacture and sell said inventions and devices on a royalty basis.

Device	Date of Royalty Agreement
1. Cylinder Grinder	January 10, 1928
2. Pinhole Grinder	December 5, 1931
3. Crankshaft Grinder	June 20, 1939
4. Crankshaft Grinder No. 2	June 20, 1939

The licensing agreement with respect to the cylinder grinder, executed under date of January 10, 1928, reads as follows:

[fol. 83] Royalty Agreement.

This Agreement, made and entered into this 10th day of January, 1928, by and between Sunnen Products Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, Party of the First Part, and Joe Sunnen of the City of St. Louis, Missouri, Party of the Second Part, Witnesseth, that

Whereas, Joe Sunnen has invented and has applied for a patent on a device known as "cylinder grinders" for use in connection with automobile engines, the application for said Letters Patent being No. 233788, and

Whereas, the corporation is desirous of manufacturing, selling and distributing said device, it is hereby agreed between the parties hereto that the said Joe Sunnen does hereby grant and give to the Sunnen Products Company the right, license and privilege to manufacture and sell said device in the United States and foreign countries, in consideration of which the Sunnen Products Company agrees to pay to the said Joe Sunnen ten percent. (10%) of the gross sales price of said device as the same are manufactured, sold and collected for.

It is further agreed between the parties hereto that either party shall have the right, without liability for damages or breach, to cancel this license or to cease manufacturing thereunder upon six months' notice in writing to the other party. In the absence of such cancellation, this Agreement shall be and continue in force for a period of ten (10) years from the date hereof.

In Witness Whereof, the parties hereto have caused this Agreement to be executed this 10th day of January, 1928.

The licensing agreements covering the other devices, i. e., pinhole grinders and crankshaft grinders, were in substance the same as the above-quoted agreement. They differed only in respect to the description of the device covered, and the period for serving cancellation notice was "one year" instead of six months.

On January 10, 1938, the original royalty agreement covering the cylinder grinder device expired and petitioner executed a renewal license for the balance of the life of [fol. 84] the patent, i. e., December 4, 1951. This agreement was in substance the same as the original agreement and retained the "six month" period for serving cancellation notice.

All of the aforementioned license agreements were submitted to the Company's board of directors before execution. The board consisted of the following five members: (1) petitioner; (2) petitioner's wife; (3) W. A. Douglass; (4) C. J. Schuepbach; and (5) R. S. Nichols. A vote of three was required to take binding action. The execution of the respective agreements on behalf of the Company was authorized by the board. Petitioner was present at such meetings but did not vote thereon.

At no time during the calendar years 1937-1941, or prior thereto, was any notice of cancellation given by either petitioner, his wife or the Company, nor did the Company give any notice of intent to cease manufacturing the devices and the agreement remained in effect throughout such period in accordance with their terms.

The manufacture and sale of such patented devices constituted more than half of the business of the Company during the taxable periods involved.

Under date of January 8, 1929, petitioner endorsed upon the back of the original license agreement of January 10, 1928, respecting the cylinder grinder device, the following statement:

January 8, 1929.

For value received I hereby sell, assign, and transfer to Mrs. Cornelia Sunnen, all my rights title and interest in and to the Royalty which shall accrue hereafter to me on the within Royalty contract.

JOE SUNNEN.

[fol. 85] On the back of said agreement also appears the following:

Royalty Lease
Standard Cylinder Grinder.
Assigned to
Cornelia Sunnen

Jan. 8-1929.

Under date of January 15, 1929, petitioner wrote a letter addressed to the Company, reading as follows:

Confirming verbal notice given you at the annual stockholders meeting held at the Company's offices on January 8th, 1929, I have for value received assigned to Cornelia Sunnen, all my rights, title and interest in the royalty contract covering "cylinder grinders", covered by letter patent No. 233788, said contract dated the 10th day of January 1928.

Under date of December 21, 1931, petitioner executed and duly acknowledged a further assignment with respect to the cylinder grinder device. After certain other preliminary recitals not material here, said assignment reads as follows:

Whereas, the United States Commissioner of Internal Revenue, through his representative, has raised some question as to the sufficiency and completeness of said assignment,

Now, Therefore, in consideration of the premises and in consideration of the original consideration of said assignment, I hereby in all respects confirm said previous assignment and by this instrument do assign, transfer, set over and deliver to Cornelia Sunnen all of my right, title and interest in and to said royalty contract of January 10, 1928 between myself and said Sunnen Products Company, relating to the manufacture of the cylinder grinder described in said royalty contract, for the calendar year 1931, particularly. And I hereby state that the royalties accruing under said royalty contract have heretofore been and are hereafter the sole and exclusive property of the said Cornelia Sunnen, and hereby declare that said royalties shall be paid to the said Cornelia Sunnen or to her order, and

that she shall have the sole right to collect, receive, receipt [fol. 86] for, retain or sue for said royalties.

In Witness Whereof, I have caused these presents to be executed this 21st day of December, 1931.

JOE SUNNEN.

On the following dates petitioner executed written assignments of the renewal agreement covering the cylinder grinder, and the original Royalty Agreements covering the other devices which he had licensed to the Company.

Cylinder grinder (renewal	Jan. 10, 1938
Pinhole grinder	Dec. 5, 1931
Crankshaft grinders	June 20, 1939

Each of said assignments purported to assign all of petitioner's right, title and interest in and to the respective royalty contract and were in form and substance similar to the assignment dated December 21, 1931, hereinbefore set forth in part.

In the case of each assignment petitioner notified the Company in writing of the execution of the assignment and enclosed a copy thereof, except the original assignment of January 8, 1929, which had been endorsed on the back of the contract. All the above assignments were made as gifts by petitioner to his wife and were without consideration. All of such gifts made after 1932 were reported by petitioner for gift tax purposes.

Pursuant to the above-mentioned license agreements and assignments, the Company paid to petitioner's wife, in the taxable periods, royalties as follows:

[fol. 87]

Royalties Paid on	1937	1938	1939	1940	1941
A. Cylinder Grinder (1928 Contract)	$4,881.35				
B. Cylinder Grinder (1938 Contract)		$3,529.21	$3,713.83	$4,951.73	$6,821.97
C. Bushing or Pinhole Grinder	15,518.68	13,789.59	15,780.50	23,259.10	123,565.38
D. Crankshaft Grinders			5,749.44	22,281.67	18,615.43
Totals	$20,400.03	$17,318.80	$25,243.77	$50,492.50	$149,002.78

Petitioner's wife included these royalties in her Federal income tax returns for the years in which she received the same. She duly paid the income taxes thereon, which have not been refunded. The income tax returns of petitioner for the years 1937 and 1938 showed gross income in the respective amounts of $38,992.40 and $45,625.36.

The parties have stipulated that if the aforementioned royalties paid to petitioner's wife in 1937 and 1938 are taxable to petitioner, then section 275 (c) of the Revenue Acts of 1936 and 1938 is applicable, and under the consent agreements the deficiencies for the years 1937 and 1938 were determined within the period prescribed by law.

It was also stipulated that the opinion and decision of the Board of Tax Appeals in Joseph Sunnen, Docket Nos. 64117, 69526 and 74077, may be considered by this Court in this proceeding to the same extent as if introduced in evidence herein.

[fol. 88] Opinion.

Leech, Judge: The question presented is whether the royalties accruing under agreements licensing the manufacture and sale of patents belonging to petitioner are taxable income to petitioner after the assignment of the royalty agreements to his wife, to whom the royalties were paid. Petitioner first relies upon a plea of res adjudicata. The basis for the plea is our decision in the case of Joseph Sunnen, Docket Nos. 64117, 69526 and 74077, entered June 29, 1935. The validity of this plea must first be determined, since if the plea is sound it will dispose of the controversy. The prior action and decision related to the taxable years 1929, 1930 and 1931. The parties were the same as those here. The question litigated was whether the royalties paid in those years pursuant to a licensing agreement dated January 10, 1928, which had been assigned to his wife on January 8, 1929, were taxable income of the petitioner. It was there held that those royalties were not taxable to petitioner. One of the issues in the instant proceeding is the same as that presented and determined in the prior proceeding except the action or claim is different in that it has to do with taxes for a later year, i. e., the taxable year. That issue relates to royalties in the amount of $4,881.35. paid to the assignee in 1937, pursuant to the royalty agree-

ment of January 10, 1928 covering the device known as a "cylinder grinder". It is the established law that where a controlling fact or matter is in issue between the same parties and such fact or matter is again put in issue in a subsequent suit between the same parties or their privies, the former adjudication, if pleaded, will be conclusive of [fol. 89] the issue in the later suit whether or not the cause of action is the same in both suits. Tait v. Western Maryland Ry Co., 289 U.S. 620; Southern Pacific R.R. Co. v. United States, 168 U.S. 1. We do not think this rule has been modified or changed by the case of Blair v. Commissioner, 300 U.S. 5, where the Supreme Court found that a new, controlling fact had intervened rendering inapplicable the doctrine of res adjudicata. We are not unmindful of recent decisions tending to limit the application of the Tait case, supra, as applied to tax litigation.[1] Until the rule is more clearly defined, however, we do not believe the doctrine of the Blair case requires a holding that any new legal concept enunciated in a subsequent decision, when the statutory law remains the same, renders the doctrine of res adjudicata inapplicable where the controlling facts and issues are identical. Tait v. Western Maryland Ry. Co., supra; Arundel-Brooks Concrete Corporation, 4 T.C. 938.[2]

With respect to the royalty payment in 1937 of $4,881.35, there is a complete identity of issues and parties. The only new circumstance here is that under later decisions of the Supreme Court our former decision would, or at least [fol. 90] might, have been different. However, the fact that our decision may have been or even was erroneous does not furnish a basis for a denial of the application of the doctrine of res adjudicata. Tait v. Western Maryland Ry. Co., supra. We therefore sustain the plea of res adjudicata as to the royalties in the amount of $4,881.35 paid in 1937 under the licensing agreement of January 10, 1928. Respondent erroneously included them in petitioner's gross income for that taxable year.

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[1]Pelham Hall Co. v. Hassett, 147 Fed. (2d) 63; Monteith Bros. Co. v. United States, 142 Fed. (2d) 139; Commissioner v. Western Union Tel. Co., 141 Fed. (2d) 774; Commissioner v. Security-First Nat. Bank of Los Angeles, 148 Fed. (2d) 937; Henricksen v. Seward, 135 Fed. (2d) 986.

[2]Reversed, Commissioner v. Arundel-Brooks Concrete Corp., ...Fed. (2d) ...., (December 10, 1945).

We do not agree, however, with petitioner's contention that the plea of res adjudicata is valid as to the royalties paid in subsequent taxable years under the renewal contract of January 10, 1938, nor to any of the royalties paid in any of the taxable years respecting the other inventions or devices. None of these royalty contracts or assignments were in issue in the prior proceedings.

The royalty agreement with respect to the "crankshaft grinders" did not come into existence until June 20, 1939. Although the royalty agreement and assignment with respect to the "pinhole" device were dated December 5, 1931, that agreement and assignment were not before the Court in the prior proceeding. As we have observed, the validity of a plea of res adjudicata where the cause of action is different rests upon the premises that the very matter or thing in issue in the latter suit must have been adjudicated in the earlier action. A question can not have been adjudged before the subject matter basing the ques- [fol. 91] tion came into existence. National Bank of Louisville v. Stone, Auditor, 174 U. S. 432, 435. New Orleans v. Citizens Bank, 167 U. S. 371. Identity of principle involved does not base a plea of res adjudicata. Snyder v. Commissioner, 73 Fed. (2d) 5. New contracts respecting other subjects create new and different controlling issues. Harris-Emery Co., 37 B. T. A. 958; D. F. Strickland, 32 B. T. A. 804. We conclude that the plea of res adjudicata is not valid as to the deficiencies for the taxable years 1938, 1939, 1940 or 1941, nor to the $15,518.68 royalties paid in the taxable year 1937 under the agreement respecting the "pinhole grinder" device.

On the merits, the respondent contends that the assignments of the royalty agreements were mere anticipatory agreements to divert and reallocate income from petitioner's property to petitioner's wife, and under the authorities he is taxable thereon. Helvering v. Horst, 311 U. S. 112; Helvering v. Eubank, 311 U. S. 122; Lucas v. Earl, 281 U. S. 111; Harrison v. Schaffner, 312 U. S. 579; Estate of J. G. Dodson, 1 T. C. 416. In the Dodson case petitioner's decedent was the sole owner of a formula protected by trademark. He licensed a corporation, in which he held a majority stock interest, to use the

formula and trademark on a royalty basis. Later he assigned a half-interest in the royalty agreement to his wife. The decedent retained title to the formula and trademark. We sustain the respondent in taxing the income from this half-interest to decedent. In the case at bar petitioner was the sole owner of certain patented devices. He entered into agreements licensing a corporation, in which he held 1,780 of the 2,000 shares of outstanding capital [fol. 92] stock, to manufacture and sell such patented devices for a prescribed period upon a royalty basis. He retained title to all the patents for the periods here involved. The license agreements were for a limited period of time, mutually subject to cancellation without liability on notice of either a six-month or one-year period. Either concurrently with the execution of the royalty agreements, or shortly thereafter, petitioner assigned the royalty agreements to his wife, who received the royalties paid thereunder. We think the facts in these two cases are so closely parallel as to make the Dodson case apposite. Thus, upon that authority, we conclude that all the royalties paid under the licensing agreements during the taxable years, except as to the amount of $4,881.35 paid in 1937 and held excludable under the doctrine of res adjudicata, were, in fact, taxable income of petitioner.

In view of our holding that all the royalties paid, except the amount of $4,881.35, were taxable to petitioner, it follows under the stipulation that the deficiencies were determined within the period prescribed by law.

Reviewed by the Court.

Decision will be entered under Rule 50.

Van Fossan, J., dissents.

Seal of The Tax Court Of The U. S.

[fol. 93] (Order of Redetermination, May 8, 1946.)

The Tax Court Of The United States

Washington

Joseph Sunnen, Petitioner,
Docket No. 6089 vs.
Commissioner Of Internal Revenue, Respondent.

Decision.

Pursuant to agreed computation of the parties filed in the above entitled proceeding May 3, 1946, it is hereby

Ordered and Decided: That there are deficiencies in income tax for the years 1937 to 1941, inclusive, in the respective amounts of $3,699.40, $4,533.01, $7,994.77, $29,540.50 and $103,227.18.

EUGENE BLACK,
Judge.

Enter: May 8, 1946
gwc

Seal of The
Tax Court
Of The U. S.

[fol. 94] (Petition of Joseph Sunnen for Review of Decisions of The Tax Court of the United States.)

(Filed July 30, 1946, The Tax Court of the United States.)

In The Circuit Court Of Appeals For The Eighth Circuit.

Joseph Sunnen, Petitioner,
Docket No. 6089 vs. Tax Court
Commissioner Of Internal Revenue, Respondent.

To The Honorable Judges Of The United States Circuit Court Of Appeals For The Eighth Circuit:

Joseph Sunnen, petitioner, by his attorn[illegible] C. P. Fordyce, hereby files his Petition for Revie[illegible] by the United States Circuit Court of Appeals for the Eighth

Circuit of a decision of The Tax Court of the United States (6 TC—#55) and states that:

I. Jurisdiction.

The petitioner, an individual residing in the City of Ladue, St. Louis County, Missouri, filed his federal income tax returns for the calendar years of 1937, 1938, 1939, 1940 and 1941 with the Collector of Internal Revenue for the First District of Missouri, which is within the jurisdicton of the United States Circuit Court of Appeals for the Eighth Circuit.

This Petition for Review is brought pursuant to the provisions of Section 1141 and Section 1142 of the Internal Revenue Code, Title 26 USCA, for a review of a decision of The Tax Court of the United States entered in the above-entitled cause on May 8, 1946.

[fol. 95] II. Prior Proceedings.

On June 28, 1944 the Commissioner of Internal Revenue mailed to petitioner a notice of deficiency determining deficiencies in petitioner's federal income taxes in the amounts and for the taxable periods shown below:

Calendar Year	Deficiencies Asserted
1937	$5,067.11
1938	4,533.01
1939	7,994.77
1940	29,540.50
1941	103,227.18

On September 21, 1944 petitioner filed with The Tax Court of the United States, his petition appealing from the proposed deficiencies. The matter was duly heard by The Tax Court on March 19, 1945 on stipulation of facts and oral testimony.

On March 11, 1946 the Tax Court promulgated its opinion and on May 8, 1946 it entered its decision, holding that there are deficiencies in income tax due by petitioner in the amounts and for the calendar years shown below:

Calendar Year	Deficiencies
1937	$3,699.40
1938	4,533.01
1939	7,994.77
1940	29,540.50
1941	103,227.18

III. Nature Of Controversy.

The three issues in controversy are: (1) Whether petitioner is taxable on royalties paid to his wife during calendar years 1937-1941 both inclusive, by Sunnen Products Company, a Missouri corporation, (hereinafter for con- [fol. 96] venience referred to as "The Company"), (2) whether the doctrines of res judicata or stare decisis are applicable in determining petitioner's liability for some or all of the aforesaid calendar years, and (3) whether the aforesaid deficiencies for the calendar years of 1937 and 1938 were determined by the Commissioner within the time prescribed by law.

On the first issue the nature of the controversy between the parties may be briefly explained as follows:

During the calendar years here involved, petitioner owned 1780 shares of stock in the Company. His wife owned 200 shares of said stock, and three other individuals owned in the aggregate 20 shares of said stock. Said Company was engaged in the business of manufacturing and selling certain tools used in the business of repairing internal combustion engines.

Petitioner invented three tools, known respectively as a "cylinder grinder", a "pinhole grinder", and a "crankshaft grinder". Petitioner applied for patents on these tools and said patents were eventually issued to him or his assignees. However, during the years here involved petitioner owned the patents or patent applications on said tools.

On January 10, 1928 petitioner and the Company entered an agreement whereby petitioner licensed it to manufacture and sell the cylinder grinder for ten years and it agreed to pay him a royalty of 10% on the gross sales price. This agreement expired on January 10, 1938 and on

said date petitioner and the Company entered into a renewal agreement whereby petitioner licensed the Company [fol. 97] to manufacture and sell said cylinder grinder until December 4, 1951 (the expiration date of the cylinder grinder patent), in consideration of its agreement to pay him a royalty of 10%.

On December 5, 1931, petitioner and the Company entered into an agreement whereby he licensed it to manufacture and sell the pinhole grinder for 10 years and the Company agreed to pay him a royalty of 10%.

On June 20, 1939, petitioner and the Company entered into an agreement whereby he licensed it to manufacture and sell the crankshaft grinder for 10 years and the Company agreed to pay him a royalty of 10%.

Shortly after the execution of the aforesaid license agreements, petitioner duly executed written assignments whereby he assigned to his wife all of his right, title and interest in and to said license agreements and authorized and directed the Company to pay the prescribed royalties to her. The Company made said payments and petitioner's wife paid income taxes on all royalties received by her from the Company.

The petitioner did not include said royalties so paid to his wife in his income tax returns for the calendar years 1937-1941, both inclusive.

The Commissioner held that the royalties were taxable to petitioner under Section 22(a) of the Revenue Acts of 1936 and 1938, and the Internal Revenue Code, and determined that the petitioner owed the aforesaid deficiencies.

The deficiencies determined by the Commissioner for 1938, 1939, 1940, and 1941, were approved by the Tax Court. [fol. 98] on authority of its decision in The Estate of J. G. Dodson vs. Commisioner, 1 TC 416. The deficiency asserted for 1937 was reduced from $5,067.11 to $3,699.40.

On the second issue the controversy between the parties involves the effect to be given to the memorandum decision of the United States Board of Tax Appeals in the case of Joseph Sunnen vs. Commissioner, Docket Nos. 64117, 69526, and 74077, promulgated on June 29, 1935. In that

case the Board held that as petitioner had assigned to his wife the property—the royalty agreement—which produced the income, petitioner was not liable for income taxes for the calendar years 1929, 1930, and 1931 on the cylinder grinder royalties paid to his wife by the Company pursuant to the above-mentioned assignment by petitioner to her of all of petitioner's right, title and interest in and to the original cylinder grinder license agreement executed on January 10, 1928.

In determining the deficiencies for 1937-1941 both inclusive, the Commissioner gave no effect to said prior decision so obtained by petitioner.

The Tax Court held that said prior decision was res judicata upon the question of petitioner's liability for 1937 income taxes on the cylinder grinder royalties paid in 1937 to petitioner's wife under the original cylinder grinder license agreement dated January 10, 1928, which was involved in said prior decision and which was in effect in 1937. Nevertheless, The Tax Court held that said prior decision could not be used to justify application of the doc- [fol. 99] trines of res judicata or stare decisis in determining petitioner's liability for income taxes for 1938-1941 both inclusive, on royalties paid under the other license agreements mentioned above.

The controversy between the parties on the third issue involves the question of whether or not the Commissioner made a timely assessment of the 1937 and 1938 deficiencies. This question turns upon the further question of whether or not the Commissioner has borne the burden of proving that the royalties paid to petitioner's wife in 1937 and 1938 are properly a part of the petitioner's gross income for said years. If the Commissioner has not borne such burden, then his assessment of the deficiencies for 1937 and 1938 was beyond the time specified in Section 275(a) Revenue Acts of 1936 and 1938. If the Commissioner has borne such burden, then he assessed said deficiencies for said years within the five-year time limit specified in Section 275(c) of said Acts, as extended by consents executed by the parties. The Tax Court held that all deficiencies were assessed in due time.

IV. Points Relied Upon By Petitioner.

1. The Tax Court erred in holding that all royalties paid (except cylinder grinder royalties of $4,881.35 paid in 1937) by Sunnen Products Company to petitioner's wife during the calendar years 1937-1941 both inclusive, constituted income taxable to petitioner under Section 22(a) of the Revenue Acts of 1936 and 1938, and the Internal Revenue Code.

[fol. 100] 2. The Tax Court erred in holding that its decision in The Estate of J. G. Dodson vs. Commissioner, 1 TC 416, justifies taxing petitioner upon the royalties mentioned in paragraph 1 above.

3. The Tax Court erred in holding that the memorandum decision of the Board of Tax Appeals in the case of Joseph Sunnen vs. Commissioner (Docket Nos. 64117, 69526, 74077, promulgated June 29, 1935) does not justify application of the doctrines of res judicata or stare decisis in determining petitioner's liability for income taxes on the royalties mentioned in paragraph 1 above.

4. The Tax Court erred in holding that the aforesaid memorandum decision justifies application of the doctrine of res judicata only in determining petitioner's liability for income taxes for 1937 on the cylinder grinder royalties of $4,881.35 paid in said year by Sunnen Products Company to petitioner's wife.

5. The Tax Court erred in holding that the Commissioner determined the deficiencies for 1937 and 1938 within the time prescribed by law.

6. The Tax Court erred in holding that the Commissioner has borne the burden of proving that petitioner is liable for income taxes upon all royalties paid by Sunnen Products Company to petitioner's wife in 1937 and 1938 (except cylinder grinder royalties paid in 1937).

7. The Tax Court erred in ordering and deciding that there are deficiencies of income tax owed by petitioner in [fol. 101] the amounts and for the years shown below:

Calendar Year	Deficiency
1937	$ 3,699.40
1938	4,533.01
1939	7,994.77
1940	29,540.50
1941	103,227.18

Wherefore, your petitioner prays that the decision of The Tax Court of the United States be reviewed by this Court, that proper action be taken to correct the errors and omissions of The Tax Court, and that the Tax Court be directed to enter an order in the above-entitled cause to the effect that no deficiencies are due by petitioner for any of the above-mentioned years.

C. P. FORDYCE,
Attorney for Petitioner,
506 Olive Street,
St. Louis 2, Mo.

State Of Missouri,
City Of St. Louis.—ss.:

C. P. Fordyce, being duly sworn, says that he is attorney of record for the above-named petitioner and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof and that said petition is true to his own knowledge.

C. P. FORDYCE,
Attorney of Record.

Subscribed and sworn to before me this 24th day of July, 1946.

My commission expires Nov. 25, 1947.

(Notarial Seal)

MARIE LANG,
Notary Public.

[fol. 102] (Notice of Filing of Petition for Review by Joseph Sunnen and Acknowledgment of Service.)

(Filed July 30, 1946, The Tax Court of the United States.)

To J. P. Wenchel,
Chief Counsel, Bureau Of Internal Revenue,
Washington, D. C.:

Please Take Notice that Joseph Sunnen has filed with the Clerk of The Tax Court of the United States at Washing-

ton, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision of The Tax Court heretofore rendered in the above-mentioned cause. A copy of the Petition for Review and Statement of Points mentioned therein is hereto attached and served upon you.

Dated this 30th day of July, 1946.

C. P. FORDYCE,
Attorney for Petitioner,
506 Olive Street,
St. Louis 2, Mo.

Due service of the above and foregoing Notice, together with a copy of the Petition for Review and Statement of Points mentioned therein, is hereby acknowledged this 30th day of July, 1946.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

[fol. 103] (Petition of Commissioner of Internal Revenue for Review of Decision of The Tax Court of the United States.)

(Received and Filed August 6, 1946, The Tax Court of the United States.)

In The United States Circuit Court Of Appeals

For The Eighth Circuit

Commissioner Of Internal Revenue,
Petitioner on Review,
T. C. Docket No. 6089. vs.
Joseph Sunnen, Respondent on Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Circuit Court of Appeals for the Eighth Circuit to review the decision entered by The Tax Court of the United States on May 8, 1946, ordering and deciding that there are deficiencies in income tax due from the tax-

payer, Joseph Sunnen, the respondent on review, for the years 1937 to 1941, inclusive, in the respective amounts of $3,699.40, $4,533.01, $7,994.77, $29,540.50 and $103,227.18. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. The taxpayer's Federal income tax returns for the years 1937 to 1941, inclusive, were filed with the Collector of Internal Revenue for the First District of Missouri, whose office is located at St. Louis, Missouri, and within the judicial circuit of the United States Circuit Court of Appeals for the Eighth Circuit, wherein this review is sought. [fol. 104] The question presented is whether the Tax Court erred in sustaining the plea of res judicata as to the royalties in the amount of $4,881.35 paid in 1937 under the licensing agreement of January 10, 1928, and in holding that the Commissioner erroneously included them in taxpayer's gross income for that taxable year. The plea of res judicata was based upon a prior decision of the Board of Tax Appeals in the case of Joseph Sunnen, Docket Nos. 64117, 69526 and 74077, entered June 29, 1935, in which it was held that the royalties paid in the taxable years 1929, 1930 and 1931, under the licensing agreement of January 10, 1928, were not taxable to taxpayer.

In the instant case the Tax Court had before it the general question as to whether the royalties accruing for the taxable years 1937 to 1941, inclusive, under certain agreements licensing the manufacture and sale of patents belonging to taxpayer are taxable income to taxpayer after the assignment of the royalty agreements to his wife, to whom the royalties were paid. On various dates taxpayer licensed the Sunnen Products Co., a Missouri corporation, in which he owned 1,780 and his wife 200 of its 2,000 shares of outstanding capital stock, to manufacture and sell the devices on a royalty basis. The agreements were assigned to taxpayer's wife, to whom the royalties were thereafter paid. The first license agreement involved is dated January 10, 1928, and it was assigned to taxpayer's wife on January 8, 1929. The only royalties accruing under this agreement and paid to taxpayer's wife in the taxable years was the [fol. 105] sum of $4,881.35 in 1937. This agreement ex-

pired January 10, 1938, and on the same date taxpayer executed a renewal license which was substantially the same as the original agreement. Under the renewal agreement royalties were paid to taxpayer's wife in the taxable years 1938, 1939, 1940 and 1941. Royalties under other license agreements were also paid to taxpayer's wife in the taxable years 1937 to 1941, inclusive. The tax Court held that all the royalties paid under the licensing agreements during the taxable years 1937 to 1941, inclusive, except as to the amount of $4,881.31 paid in 1937 and held excludible under the doctrine of res judicata, were taxable to taxpayer.

The Commissioner now assigns the following points on which he intends to rely in this proceeding:

The Tax Court of the United States erred:

1. In sustaining the plea of res adjudicata as to royalties in the amount of $4,881.35 paid in 1937 under the licensing agreement of January 10, 1928, and in holding that the Commissioner erroneously included them in taxpayer's gross income for that taxable year.

2. In failing to uphold the determination of the Commissioner that the royalties in the amount of $4,881.35 paid in 1937 under the licensing agreement of January 10, 1928, were taxable to taxpayer.

3. In holding that there is a deficiency in income tax for the year 1937 of only $3,699.40, and in failing to hold that there is a deficiency in income tax of $5,067.11 for the year 1937.

[fol. 106] 4. In that its opinion and decision are contrary to law.

DOUGLAS W. McGREGOR,
Assistant Attorney General.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.
Attorneys for Petitioner on Review.

[fol. 107] (Notice of Filing of Petition for Review by Commissioner of Internal Revenue and Acknowledgment of Service by Counsel for Respondent.)

(Received August 6, 1946, and Filed August 6 and 12, 1946, The Tax Court of the United States.)

To: C. Powell Fordyce, Esquire,
506 Olive Street,
St. Louis 1, Missouri.

You are hereby notified that the Commissioner of Internal Revenue did on the 6th day of August, 1946, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 6th day of August, 1946.

VICTOR S. MERSCH
Clerk, The Tax Court of the U.S.

Service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 8th day of August, 1946.

C. POWELL FORDYCE
Attorney for Respondent on Review.

[fol. 108] (Notice of Filing of Petition for Review by Commissioner of Internal Revenue and Acknowledgement of Service by Respondent on Review.)

(Received and Filed August 16, 1946, The Tax Court of the United States.)

To: Mr. Joseph Sunnen,
400 South Warson Road,
Clayton, Missouri.

You are hereby notified that the Commissioner of Internal Revenue did on the 6th day of August, 1946, file with the Clerk of The Tax Court of the United States, at

Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 6th day of August, 1946.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 8 day of August, 1946.

JOSEPH SUNNEN,
Respondent on Review.

[fol. 109] (Joint Praecipe for Transcript on Petitions for Review.)

(Filed August 6, 1946, The Tax Court of the United States.)

In The United States Circuit Court Of Appeals For The Eighth Circuit.

Joseph Sunnen, Petitioner and Respondent on Review, Docket No. 6089 vs. The Tax Court Commissioner Of Internal Revenue, Respondent and Petitioner on Review.

To The Clerk Of The Tax Court Of The United States:

You Are Hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, with reference to the Petitions for Review heretofore filed by petitioners in the above-entitled causes, a transcript of the record in the above-entitled causes, prepared and transmitted as required by law and by the rules of said Court and to include in said transcript of record the following documents or certified copies thereof:

(1) Docket entries of proceedings before The Tax Court of the United States

(2) Pleadings before The Tax Court as follows:

(a) Petition, including Exhibit A

(b) Answer

(c) Reply

(3) Stipulation of facts, including all exhibits attached thereto and made a part thereof

(4) Testimony of John O. Price.

(5) Memorandum opinion and decision of the United States Board of Tax Appeals in cause entitled "Joseph Sunnen, petitioner, vs. Commissioner of Internal Revenue, respondent, Docket Nos. 64117, 69526, and 74077, entered on June 29, 1935

(6) The findings of fact and opinion of The Tax Court of the United States promulgated on March 11, 1946

(7) Decision of The Tax Court of the United States entered on May 8, 1946

[fol. 110] (8) Petition for review filed by petitioner Joseph Sunnen in this cause and notice of filing with acknowledgment of service by respondent, Commissioner of Internal Revenue.

(9) This designation of contents of record on review.

(10) Petition for review filed by Commissioner of Internal Revenue, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

C. P. FORDYCE,
Attorney for Petitioner,
506 Olive Street,
St. Louis 2, Mo.

Service of a copy of the foregoing designation is hereby acknowledged as having been made on this 6th day of August, 1946, and agreed to.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[fol. 111] (Clerk's Certificate to Transcript.)

The Tax Court Of The United States

Washington

Joseph Sunnen, Petitioner,

Docket No. 6089 vs.

Commissioner Of Internal Revenue, Respondent.

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 110, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 16th day of August, 1946.

VICTOR S. MERSCH,
Clerk,
The Tax Court of the United States.
EMT

Seal of The
Tax Court
Of The U. S.

Filed Aug. 29, 1946, E. E. Koch, Clerk.

[fol. 112] (Stipulation as to division of cost of printing record; for Consolidation of cases for briefing and argument, and as to times for filing briefs.)

(Filed in U. S. Circuit Court of Appeals on September 9, 1946:)

United States Circuit Court Of Appeals For The Eighth Circuit.

Joseph Sunnen, Petitioner,

No. 13,425 vs.

Commissioner Of Internal Revenue, Respondent.

Commissioner of Internal Revenue, Petitioner,

No. 13,426 vs

Joseph Sunnen, Respondent.

It is hereby stipulated in connection with the above-entitled cases, subject to the approval of the Court, that:

1. The cost of printing the joint record for both cases will be paid one-half by each party.

2. The two cases are to be consolidated for briefing and argument.

3. The brief on behalf of Joseph Sunnen covering the issues involved in both appeals will be filed on or before December 1, 1946; the brief on behalf of the Commissioner of Internal Revenue covering the issues in both appeals will be filed on or before January 1, 1947; and the reply brief on behalf of Joseph Sunnen will be filed on or before January 20, 1947.

C. P. FORDYCE,
Counsel for Joseph Sunnen,

D. W. McGREGOR,
Assistant Attorney General,
Counsel for the Commissioner of Internal Revenue.

September 7, 1946.

(Endorsed): Nos. 13,425 and 13,426. Filed in U. S. Circuit Court of Appeals on September 9, 1946.

And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Petitioner in Cause No. 13425.)

United States Circuit Court of Appeals

Eighth Circuit

No. 13425

JOSEPH SUNNEN, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

The Clerk will enter my appearance as Counsel for the Petitioner.

C. P. FORDYCE,
506 Olive St., St. Louis (1), Mo.
HENRY J. RICHARDSON,
Transportation Bldg., Washington, D. C.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Aug. 31, 1946.

(Appearance of Mr. Douglas W. McGregor and Mr. Sewall Key as Counsel for Respondent in Cause No. 13425.)

The Clerk will enter our appearance as Counsel for the Respondent.

DOUGLAS W. MCGREGOR,
Assistant Attorney General,
SEWALL KEY,
Special Assistant to the Attorney General,
Department of Justice, Washington 25, D. C.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sept. 5, 1946.

(Appearance of Mr. J. P. Wenchel and Mr. John M. Morawski as Counsel for Respondent in Cause No. 13425.)

The Clerk will enter my appearance as Counsel for the Respondent.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
JOHN M. MORAWSKI,
Special Attorney, Bureau of Internal Revenue,
Washington 25, D. C.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sept. 7, 1946.

756048—47——1

(Appearance of Mr. Robert N. Anderson and Miss Helen Goodner as Counsel for Respondent in Cause No. 13425.)

The Clerk will enter our appearances as Counsel for the Respondent.

SEWALL KEY,
Acting Assistant Attorney General.
ROBERT N. ANDERSON,
HELEN GOODNER,
Special Assistants to the Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 20, 1947.

(Appearance of Mr. Hilbert P. Zarky as Counsel for Respondent in Cause No. 13425.)

The Clerk will enter my appearance as Counsel for the Respondent.

HILBERT P. ZARKY,
Special Assistant to the Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Mar. 5, 1947.

(Appearance of Mr. Douglas W. McGregor and Mr. Sewall Key as Counsel for Petitioner in Cause No. 13426.)

United States Circuit Court of Appeals

Eighth Circuit

No. 13426

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JOSEPH SUNNEN

The Clerk will enter our appearance as Counsel for the Petitioner.

DOUGLAS W. MCGREGOR,
Assistant Attorney General.
SEWALL KEY,
Special Assistant to the Attorney General,
Department of Justice, Washington 25, D. C.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sept. 5, 1946.

(Appearance of Mr. J. P. Wenchel and Mr. John M. Morawski as Counsel for Petitioner in Cause No. 13426.)

The Clerk will enter my appearance as Counsel for the Petitioner.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.
JOHN M. MORAWSKI,
Special Attorney, Bureau of Internal Revenue,
Washington 25, D. C.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sept. 7, 1946.

(Appearance of Mr. Robert N. Anderson and Miss Helen Goodner as Counsel for Petitioner in Cause No. 13426.)

The Clerk will enter our appearances as Counsel for the Petitioner.

SEWALL KEY,
Acting Assistant Attorney General.
ROBERT N. ANDERSON,
HELEN GOODNER,
Special Assistants to the Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 20, 1947.

(Appearance of Mr. Hilbert P. Zarky as Counsel for Petitioner in Cause No. 13426.)

The Clerk will enter my appearance as Counsel for the Petitioner.

HILBERT P. ZARKY,
Special Assistant to the Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Mar. 5, 1947.

(Appearance of Counsel for Respondent in Cause No. 13426.)

The Clerk will enter my appearance as Counsel for the Respondent,

C. P. FORDYCE,
506 Olive St., St. Louis (1), Mo.
HENRY J. RICHARDSON,
Transportation Bldg., Washington, D. C.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Aug. 31, 1946.

Order of Submission in Causes Nos. 13425 and 13426

United States Circuit Court of Appeals, Eighth Circuit

March Term, 1947. Wednesday, March 5, 1947

No. 13425

JOSEPH SUNNEN, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of The Tax Court of the United States

and

No. 13426

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JOSEPH SUNNEN

On Petition to Review Decision of The Tax Court of the United States

These causes Nos. 13425 and 13426, having been called for hearing in their regular order are argued together and argument was commended by Mr. C. P. Fordyce for Joseph Sunnen, continued by Mr. Hilbert P. Zarky, Special Assistant to The Attorney General, for the Commissioner of Internal Revenue, and concluded by Mr. C. P. Fordyce for Joseph Sunnen.

Thereupon, these causes were submitted to the Court on the transcript of record from said The Tax Court of the United States and the briefs of counsel filed herein.

Opinion in Causes Nos. 13425 and 13426

United States Circuit Court of Appeals, Eighth Circuit

No. 13425

JOSEPH SUNNEN, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review Decision of the Tax Court of the United States

No. 13426

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JOSEPH SUNNEN, RESPONDENT

On Petition to Review Decision of the Tax Court of the United States

[April 28, 1947]

Mr. C. P. Fordyce for Joseph Sunnen.

Mr. Hilbert P. Zarky, Special Assistant to the Attorney General (Mr. Sewall Key, Acting Assistant Attorney General, Mr. Robert N. Anderson and Miss Helen Goodner, Special Assistants to the Attorney General, were on the brief) for Commissioner of Internal Revenue.

Before GARDNER, THOMAS, and RIDDICK, Circuit Judges.

THOMAS, Circuit Judge, delivered the opinion of the court.

These two petitions to review a single decision of the Tax Court present identical or similar questions for determination. By stipulation of the parties the cases have been consolidated here for briefing and argument and will accordingly be disposed of by us in one opinion.

The questions presented are: (1) Whether the petitioner, Joseph Sunnen, is taxable under § 22 (a) of the Revenue Act of 1936, 49 Stat. 1648, 26 U. S. C. A. Internal Revenue Acts, page 825,[1] and under § 22 (a) of the Revenue Act of 1938, 52 Stat. 447, 26 U. S. C. A. Internal Revenue Acts, page 1008, for income from certain patent license royalty contracts which he had assigned to his wife; (2) Whether a former decision of the Board of Tax Appeals involving other taxable years is res judicata as to the taxes here involved; and (3) Whether the assessments for two of the years involved were made within the time prescribed by law.

The appeal of Sunnen, the taxpayer, in No. 13425 involves deficiencies in income taxes for the years 1937 to 1941, inclusive;

[1] Section 22. Gross Income.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Section 22 (a) of the Revenue Act of 1938 is the same.

and the appeal of the Commissioner in No. 13426 involves a deficiency for the year 1937 only.

The evidentiary facts are not in dispute. At all times material here the Sunnen Products Company, a Missouri corporation, was engaged at St. Louis, Missouri, in the manufacture and sale of patented grinding machines and other tools. The corporation had outstanding 2,000 shares of capital stock of which petitioner Joseph Sunnen, president of the company, owned 1,780 shares, Cornelia Sunnen, his wife, held 200 shares, W. A. Douglass, vice president, 19 shares, and C. J. Schuepach and R. S. Nichols, one share each. These five persons constituted the board of directors; and it was stipulated that a vote of three directors was required to make any action binding upon the Company.

Josph Sunnen was an inventor of machines for use in repairing automobiles. He applied for a patent on a "Cylinder Grinder" in 1927, a "Pinhole Grinder" in 1931, and a "Crankshaft Grinder" in 1939, on which he received patents in 1934, 1933, and 1941, respectively. He continued to own these patents through 1941. He, also, applied for a patent on an "Improved Crankshaft Grinder" in 1939, and in 1942 assigned the application to his wife Cornelia. In 1943 a patent was issued to her thereon.

After applying for patents on these several devices Sunnen entered into written contracts with the Products Company, by the terms of which he licensed the company to manufacture and sell the devices in the United States and foreign countries in consideration of a royalty of 10% of the gross sales price of the devices, to be paid to him "as the same are manufactured, sold and collected for."

The Cylinder Grinder license or royalty agreement was first executed January 10, 1928, expired January 10, 1938, and was renewed for the life of the patent which will expire on December 4, 1951. The Pinhole Grinder agreement was executed December 5, 1931, and the Crankshaft and Improved Crankshaft agreement June 20, 1931. The last two contracts were for a period of 10 years each.

Each royalty agreement contained a provision that "either party shall have the right without liability for damages or breach, to cancel this license or to increase manufacturing thereunder * * *" The original Cylinder Grinder contract required a six months' written notice of cancellation; the other contracts required one year's written notice. No notices of cancellation were given by either party during the period involved in this controversy.

After the royalty contracts were executed Sunnen assigned them to his wife Cornelia in writing and gave notice thereof to the company. Each assignment provided that "I [Joseph Sunnen] do hereby assign * * * to Cornelia Sunnen all of my right, title

and interest in and to a royalty contract this day executed" * * * etc. The assignments were gifts to the taxpayer's wife, and all gifts made after 1932 were reported for gift tax purposes.

In 1937 Mrs. Sunnen received $4,881.35 royalties from the 1928 Cylinder Grinder contract and $15,518.68 from the Pinhole Grinder contract. She received no royalties after 1937 from the original Cylinder Grinder contract; but from the 1938 renewal thereof and from the other contracts she received in 1938, $17,318.80; in 1939, $25,243.77; in 1940, $50,402.50; and in 1941, $149,002.78, all of which sums were included in her income tax returns and taxes were paid thereon. The income tax returns of petitioner Sunnen for the years 1937 and 1938 showed gross income in the respective amounts of $38,992.40 and $47,325.36.

The decision of the Tax Court in this proceeding was made March 11, 1946. In a previous proceeding involving the taxpayer's income tax liability for the years 1929, 1930, and 1931, the Board of Tax Appeals in a decision entered June 29, 1935, held that Joseph Sunnen was not liable for income taxes on the royalties paid by the Sunnen Products Company to his wife in those years under the original Cylinder Grinder license agreement of January 10, 1928, and the assignment thereof. That decision was based upon the finding that the royalty contract was an assignable property right; that the assignment vested the title to the property in the assignee; and that the license contract and not Sunnen produced the income. The Board cited as authority for its decision Nelson v. Ferguson, 3 Cir., 56 F. 2d 121, cert. den., 286 U. S. 565.

The same royalty agreement involved in the 1935 proceeding was in effect in 1937, and the Tax Court in this proceeding held that the 1935 decision is res judicata that the royalties of $4,881.35 paid thereunder to Cornelia Sunnen in 1937 are not taxable to Sunnen. The correctness of this ruling is the question here presented by the Commissioner's appeal in No. 13,426.

In the present case the Tax Court on the authority of its own decision of January 15, 1943, in Estate of J. D. Dodson, 1 T. C. 416, held that all of the royalties paid to Mrs. Sunnen under the assigned royalty contracts involved were taxable to Joseph Sunnen. The basis of the decision is that by reason of his ownership of a majority of the stock of the Sunnen Products Company, his continued ownership of the patents, and the fact that the royalty contracts were for a limited period and cancellable upon 6 months' or a year's notice, Sunnen retained such control over the income as to make him liable for the taxes thereon.

The most important question presented for determination is whether the income derived from the several royalty contracts for the use of patents and assigned without consideration by Sunnen to his wife constituted a gift of income before it was earned

and payable, and is, therefore, taxable to the donor; or, on the other hand, was it a gift of property which after the gift was complete produced income taxable to the donee. In other words, we must determine on which side of the line that separates "gifts of income-producing property and gifts of income from property of which the donor remains the owner" the income of Mrs. Sunnen from royalties falls. Harrison v. Schaffner, 312 U. S. 579, 583.

It is now quite definitely settled that an anticipatory assignment to a member of one's family of unearned wages or of the future income of property over which the assignor retains control or ownership does not shift the income tax from the assignor to the assignee. Lucas v. Earl, 281 U. S. 111; Helvering v. Clifford, 309 U. S. 331; Helvering v. Horst, 311 U. S. 112; Helvering v. Eubank, 311 U. S. 122; Harrison v. Schaffner, 312 U. S. 579. By applying the principle of these cases to the facts in the present case, the Commissioner contends that the decision of the Tax Court must be sustained. His first argument is that the patents, ownership of which was retained by Sunnen, and not the royalty contracts constitute the tree to which the fruit (income) must be attributed. We think the weight of authority is clearly to the contrary. The rule seems to be established that a royalty contract is the producing source of the royalty income and that such income is taxable to the assignee. Commissioner v. Field, 2 Cir., 42 F. 2d 820; Hall v. Burnet, App. D. C., 54 F. 2d 443, cert. den., 285 U. S. 552; Nelson v. Ferguson, 3 Cir., 56 F. 2d 121, cert. den., 286 U. S. 565; Lowery v. Helvering, 2 Cir., 70 F. 2d 713; Helvering v. Seatree, App. D. C., 72 F. 2d 67, 68; Shanley v. Bowers, 2 Cir., 81 F. 2d 13; Commissioner v. O'Donnell, 9 Cir., 90 F. 2d 907, 910, reversed on other grounds, 303 U. S. 370.

In this instance the royalty contracts are Missouri contracts and are assignable under Missouri law. Rosecrans v. William S. Lozier, Inc., 8 Cir., 142 F. 2d 118, 124; Keeley v. Indemnity Co., 222 Mo. App. 439, 7 S. W. 2d 434. The assignments are also Missouri contracts. The question of their character, validity, the nature and extent of the interest of the assignee and the powers and rights of the assignor are to be determined therefore by Missouri law. Blair v. Commissioner, 300 U. S. 5; Freuler v. Helvering, 291 U. S. 35; Eisenmenger v. Commissioner, 8 Cir., 145 F. 2d 103, 106.

The law in Missouri is the same as the law generally, namely, that an assignment of a contract without reservation vests in the assignee all the title that the assignor possessed. 6 C. J. S. Assignments § 95; Houser v. Richardson, 90 Mo. App. 134. And "The assignor, after an unqualified assignment and notice to the debtor, usually loses all control over the chose and can do nothing to defeat the rights of the assignee." 6 C. J. S. Assignments § 96;

Leahey v. Dugdale, 41 Mo. 517; Lord v. Schamdoeffel, 50 Mo. App. 360; Buffington v. South Missouri Land Co., 25 Mo. App. 492.

Unlike the transactions involved in Helvering v. Horst, supra, Harrison v. Schaffner, supra, and other cases cited supra, here the assignments of the royalty contracts were conveyances in praesenti of vested income-producing property rights. They were not mere gifts of money payable in the future from the earnings of the donor or from income-producing property owned by him. A royalty contract resembles a lease of real property and the royalties payable thereunder are analogous to rent. Had the royalty contracts not been assigned in the present case the royalties when paid to Sunnen would have been income taxable to him, the same as rents are taxable to the landlord. Burnet v. Harmel, 287 U. S. 103, 108. After the assignments the royalties were "no more the income of the donor than would be the rent from a lease or a crop raised on a farm after the leasehold or the farm had been given away." Helvering v. Horst, supra, p. 119.

The contention that the patents, ownership of which was retained by Sunnen, and not the royalty or license contracts which he assigned to his wife, produced the income is contrary to the authorities and must be rejected.

We must consider, therefore, the specific grounds upon which the Tax Court predicated its conclusion that after the assignment of the license contracts to his wife Sunnen remained the owner of the royalties for tax purposes.

The Tax Court held (1) that Sunnen at all times, notwithstanding the assignments, had the express right to cancel the royalty or license contracts, and (2) that by virtue of his position as majority stockholder of the Sunnen Products Company he had the unrestricted power to modify or abrogate the royalty contracts at any time.

The first of these conclusions is based upon the decision of the Tax Court in Estate of Dobson, 1 T. C. 416, 423, which supports the theory on the ground that Sunnen, the assignor, was a party to the license contract and that the assignee was not. This result clearly ignores the legal effect of the assignments, all of which without reservation vested in the assignee all right, title and interest of the assignor. The assignments conveyed to the assignee the right to give notice of cancellation reserved in the royalty contracts as clearly and effectually as they conveyed the right to receive the royalties when payable.

To support the second proposition that Sunnen could modify or abrogate the royalty contracts after their assignment to Mrs. Sunnen by reason of his majority interest in the capital stock of the company, the Commissioner cites the decision of this court in

Dickey v. Burnet, 8 Cir., 56 F. 2d 917. The facts in the Dickey case differed radically from the facts in the present case. There Dickey entered into a contract with the Ontario Realty Company, a corporation in which he owned a controlling interest, by the terms of which he sold to the corporation a tract of clay-producing land. The contract provided that the corporation should pay two-thirds of the gross income from the land to Dickey's wife and children. The only income of the land resulted from a contract thereafter entered into between Dickey and the corporation whereby he agreed to pay $1 a ton for the clay produced from the land for use in his several clay plants until the clay was exhausted. The latter contract was by its terms to become effective January 1, 1917, and was "to continue from year to year unless terminated by mutual agreement", and the royalty was subject to change from time to time as conditions justified. This last contract was not assigned to Dickey's wife and children. All the rights and reservations in it remained personal to Dickey. He could thus control the gross income or terminate it at any time and his wife and children, beneficiaries of the first contract, could not complain. In the instant case Sunnen retained no such powers in the royalty contracts made with the company, and he made no reservations in the assignments to his wife. The cases, therefore, are not comparable. Here the royalties were not changeable at the will of the assignor. They were fixed at 10% of the gross sales. After the assignments were made Sunnen had no power either to alter or to abrogate them.

The argument that Sunnen could so manipulate the Products Company by reason of his majority stock interest as to destroy the income covered by the assigned royalty contracts is not tenable. Neither the Tax Court nor this court should base a decision upon conjectured or possible fraud. A majority stockholder in a corporation neither owns nor directly controls the contracts or assets of the corporation. The only legitimate thing the corporation could do in this case to destroy the income from royalties would be to exercise its reserved right to cancel the contracts upon notice, as provided in each contract. On that proposition Sunnen could vote as one member of the board of five directors only. He had no plenary power as a majority stockholder even to cancel the royalty contracts. Although Sunnen was a member of the board of five directors of the Sunnen Products Company, as heretofore stated it was stipulated that the vote of three members was required to bind the company.

There is, therefore, no "warrant in the record" (Dobson v. Commissioner, supra, p. 501) to support the finding and decision of the Tax Court that Sunnen either individually or as a majority stock holder had power to destroy the income from the royalty

contracts and thus defraud the assignee. The general rule is that "In courts of law as well as those of equity, after notice to the debtor of an assignment, the interest of a bona fide assignee of a chose in action will be protected against any unauthorized act on the part o the assignor tending to interfere with the rights of the assignee. This protection extends to the nullifying of collusive agreements of the assignor and the debtor to defeat the rights of the assignee." 4 Am. Jur., Assignments, § 105. A collusive agreement, therefore, between Sunnen as majority stockholder and the Products Company to defeat the rights of Mrs. Sunnen as assignee of the royalty contracts would be illegal. Sunnen had no legal right either to cancel or to abrogate the royalty contracts or in any way to modify them before they expired by their own terms. Neither his ownership of the patents nor of the majority of the corporate stock of the Products Company enabled him to any legal way to interfere with the right of the assignee of the royalty contracts. After the assignments were made Sunnen was no longer the owner, actually or constructively, either of the contracts or of the royalties. Compare Commissioner v. Ross, 6 Cir., 83 F. 2d 18, 19; Langley v. Commissioner, 2 Cir., 61 F. 2d 796; Lum v. Commissioner, 3 Cir., 147 F. 2d 356. Under these circumstances a court of equity would protect the rights of Mrs. Sunnen against any illegal interference with such rights by Sunnen personally or by Sunnen in collusion with with Products Company. If, therefore, the finding of the Tax Court that Sunnen could control or defeat the payment of royalties to his wife be considered a finding of fact it is without "warrant in the record", and if it be regarded as a conclusion of law it is without any "reasonable basis in the law." Dobson v. Commissioner, 320 U. S. 489, 501.

Another ground relied upon by the Tax Court to support its holding that Sunnen must be regarded as the owner of the royalties provided for in the license agreements is that these agreements are "short time" contracts. It is true that short time trusts created obviously for the purpose of evading taxes do not relieve the creator of such a trust from the duty of paying taxes on the income of the corpus when control of the trust estate is reserved directly or indirectly by the trustor. That rule is not applicable here. In the instant case one of the license agreements continues during the life of the patent and the others are for 10 years each. Considering the nature of a patent license contract a 10-year license cannot fairly be said to be for so short a period as to affect the validity of the assignment thereof as a gift. Like a lease covering real estate it may be for a short or a long period, depending upon the circumstances in each case. The period of the license is a material fact in a tax case only when considered

in connection with other facts which disclose a purpose to evade taxes. Considered alone the 10-year period of the license contracts does not affect the validity of the assignments as conveyances of income-producing property and render them conveyances of the income alone. To hold otherwise requires the court to repudiate or to ignore the fundamental law of assignments stated above.

Two facts only appear in the record which the Commissioner must rely upon to support the holding of the Tax Court. They are that the assignments of the royalty contracts involved (1) constituted gifts of income-producing property, (2) from a husband to his wife, members of a family group. The Supreme Court has not held, however, nor has Congress provided by statute, that the income rom such a completed gift is taxable to the donor. All the Supreme Court has said is that any family arrangement which splits a donor's income among the members of his family requires "special scrutiny lest what is in reality but one economic unit be multiplied into two or more by devices which, though valid under State law, are not conclusive so far as § 22 (a) is concerned." Helvering 1. Clifford, supra. This is far from saying that a husband cannot by a bona fide and completed gift transfer to his wife income-producing property without thereafter being liable for Federal income taxes on subsequent earnings of the property. Where a gift is complete, without reservations and without retention of control by the donor, no decision of the Supreme Court has been called to our attention which holds the income therefrom taxable to the donor. The holding of that Court is directly to the contrary in Blair 1. Commissioner, 300 U. S. 5, at page 13.[2]

In his appeal in No. 13,426 the Commissioner contends that the Tax Court erred in holding that the decision of the Board of Tax Appeals in 1935 is res judicata as to royalties of $4,881.35 paid in 1937 to Sunnen's wife, the assignee, under the same cylinder grinder royalty agreement and the same assignment and in holding that said royalties are not taxable to Sunnen. The 1935 decision involved Sunnen's tax liability for the years 1929, 1930, and 1931. The Commissioner's specific contentions are that the principle of res judicata is not applicable (1) because in the

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[2] The Supreme Court in the Blair case said:

"The will creating the trust entitled the petitioner during his life to the net income of the property held in trust. He thus became he owner of an equitable interest in the corpus of the property. (Citations.) By virtue of that interest he was entitled to enforce the trust, o have a breach of rust enjoined and to obtain redress in case of breach. The interest was present property alienable like any other, in the absence of a valid restraint upon alienation. (Citations.) The beneficiary may thus transfer a part of his interest as well as the whole. (Citation.) The assignment of the beneficial interest is not the assignment of a chose in action but of the 'right, title and estate in and to property.' (Citations.)

"We conclude that the assignments were valid, that the assignees thereby became the owners of the specified beneficial interests in the income, and that as to these interests they and not the petitioner were taxable for the tax years in question. * * *"

interval between the 1935 decision and the decision in the present proceeding the Supreme Court has introduced "new approaches and new concepts * * * into the law of taxation" which show that the 1935 decision was clearly erroneous, and (2) for the reason that the facts and issues in the case here are not identical with the facts and issues in the former case.

In support of his first proposition the Commissioner relies upon the decision of the Supreme Court in Helvering v. Clifford, supra; Helvering v. Horst, supra; Helvering v. Eubank, supra; and Harrison v. Schaffner, supra. His contention is that under the principles of these cases Sunnen must be considered the owner for tax purposes of the royalties paid to his wife in all of the tax years, both the years 1929, 1930, and 1931, involved in the 1935 decision, and the years 1937 to 1941, inclusive, involved in this case.

It is elementary, of course, that the doctrine of res judicata is not applicable where there has been an intervening change in the controlling law. We do not think that any new principle of law controlling decision in this case was announced in the Clifford case or in the other cases cited and relied upon by the Commissioner. The principle claimed to have come into existence in these cases is that income is taxable to one as owner who controls the disposition of the income. But we have shown in the first part of this opinion that that rule or principle does not in any way affect the result in this case.

The second argument is that since income taxes are imposed on an annual basis the claim for taxes in one year is not the same cause of action as the claim for taxes in another year, that the issues are different, and therefore the rule of res judicata cannot apply.

This contention has support in some the decisions of the Federal courts, but we have no doubt that the great weight of authority is to the contrary. Tait v. Western Maryland R. Co., 289 U. S. 620; Southern Pacific R. Co. v. United States, 168 U. S. 1, 48; Montgomery v. Thomas, Collector, 5 Cir., 146 F. 2d 76, 79, 80; Gillespie v. Commissioner, 10 Cir., 151 F. 2d 903, 906; Cory v. Commissioner, 3 Cir., 159 F. 2d 390, and authorities cited; and Bennett v. Commissioner, 5 Cir., 113 F. 2d 837.

One of Sunnen's contentions is that the decision of the Board of Tax Appeals in 1935 is res judicata or within the principle of stare decisis in respect of all the taxes here in controversy. This proceeding, however, involves not only taxes for different years but with the exception of the 1937 royalties produced by the 1928 contract, it involves different royalties from different royalty contracts for use of different patents. It is true that there is a common relation between the two proceedings. The parties are

the same in each case and the questions to be determined are the same. In view of our decision on the merits, however, it is unnecessary to determine this contention.

Our conclusions with reference to the first two questions presented for determination make it unnecessary to consider whether the deficiencies for the years 1937 and 1938 were determined by the Commissioner within the time prescribed by law.

The decision of the Tax Court in No. 13,425, involving the petition of Joseph Sunnen, is reversed, and the decision assailed by the Commissioner in No. 13,426 is affirmed.

A true copy.

Attest:

[SEAL] E. E. KOCH,

Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

Judgment in Causes Nos. 13425 and 13426

United States Circuit Court of Appeals, Eighth Circuit

March Term, 1947

Monday, April 28, 1947

No. 13425

JOSEPH SUNNEN, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of The Tax Court of the United States

and

No. 13426

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JOSEPH SUNNEN

On Petition to Review Decision of The Tax Court of the United States

These causes came on to be heard on the transcript of the record from The Tax Court of the United States, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of the Tax Court in these causes involving the petition of Joseph Sunnen to review be, and is hereby, reversed, and the decision of the Tax Court assailed by the Commissioner of Internal Revenue be, and is hereby, affirmed.

APRIL 28, 1947.

Clerk's Certificate

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of record on petitions to review the decision of The Tax Court of the United States, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein Joseph Sunnen was Petitioner and the Commissioner of Internal Revenue was Respondent, No. 13425, and the Commissioner of Internal Revenue was Petitioner and Joseph Sunnen was Respondent, No. 13426, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the 19th day of May A. D. 1947, a mandate was issued out of said Circuit Court of Appeals in said causes, directed to The Tax Court of the United States.

In Testimony Whereof, I hereunder subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 21st day of July A. D. 1947.

[SEAL]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1947

Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1947